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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 573

GOVERNOR RUBEN ASKEW, successor to and substituted for Governor Claude R. Kirk, Jr., ET AL., *Appellants*,

v.

ROBERT H. HARGRAVE, ET AL., *Appellees*.

On Appeal From the United States District Court for the Middle District of Florida

BRIEF FOR APPELLEES

GLASSIE, PEWETT, BEEBE & SHANKS
By
HERSHEL SHANKS
ALLAN I. MENDELSOHN
ROBERT M. PERCE, JR.
Federal Bar Building West
1819 H. Street, N. W.
Washington, D. C. 20006

RICHARD H. FRANK
918 Marine Bank Building
Tampa, Florida 33602
Attorneys for Appellees

DAVID RUBIN
1201 Sixteenth Street, N. W.
Washington, D. C. 20006
Of Counsel

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	3
Statement	3
A. The Background: Financing Public Education in Florida	6
B. The Millage Rollback Act and Its Effect	10
C. The Procedural History of This Case	15
Summary of Argument	16
Argument:	
I. The Millage Rollback Act Violates the Equal Protection Clause of the Fourteenth Amendment	18
A. An Analysis of the Equal Protection Violation	18
B. The Choice of a Standard of Review	21
C. The "Compelling Interest" Test Is Applicable Because the Millage Rollback Act Classifies Counties According to Wealth	23
D. The Line Drawn by the Millage Rollback Act Is Especially Invidious Because It Classifies on the Basis of Wealth in Respect to the Allocation of Educational Resources	30
1. The Importance of Education	33
2. The Compulsory Nature of Education	36

Page

E. No Reasonable Basis, Let Alone a Compelling State Interest, Can Be Found To Justify the Distinctions Drawn by the Millage Rollback Act 41

F. The Significance of *McInnis* v. *Ogilvie*, 394 U.S. 322 (1969), and *Burruss* v. *Wilkerson*, 396 U.S. 44 (1970), to the Case at Bar 47

1. Distinguishing *McInnis* and *Burruss* 50

2. *McInnis* and *Burruss* Should Be Limited to Their Precise Facts 53

3. Even the Narrow Holding in *McInnis* and *Burruss* Is Incorrect 57

II. This Court Should Not Abstain From Deciding This Case in Deference to a State Court 59

Conclusion 66

Appendix A 67

Appendix B 68

TABLE OF AUTHORITIES

Cases:

Anders v. California, 386 U.S. 738 (1967) 30
Aptheker v. Secretary of State, 378 U.S. 500 (1964) .. 45
Ashwander v. T.V.A., 297 U.S. 288 (1935) 63
Baker v. Carr, 369 U.S. 186 (1962) 56
Baldwin v. Seelig, 294 U.S. 511 (1934) 45
Boddie v. Connecticut, No. 27, Oct. T., 1970 38
Brown v. Board of Education, 347 U.S. 483 (1954) 22, 33, 34
Burns v. Ohio, 360 U.S. 252 (1959) 30
Burruss v. Wilkerson, 396 U.S. 44 (1970), *aff'g mem.* 310 F. Supp. 572 (W.D. Va. 1969) ..32, 47, 49, 50, 51, 52, 53, 54, 55, 56, 57, 59
Cafeteria Workers v. McElroy, 367 U.S. 886 (1964) 18
Carrington v. Rash, 380 U.S. 89 (1965) 45, 46
Chew v. Colding, 344 U.S. 590 (1953) 18

Page

Cipriano v. City of Houma, 393 U.S. 1061 (1969) 8
Dandridge v. Williams, 397 U.S. 471 (1970) ...39, 40, 41, 58
Dixon v. Alabama State Board of Education, 394 F.2d 150 (5th Cir. 1961) 34
Douglas v. California, 372 U.S. 253 (1963) ...23, 24, 28, 29, 30, 31, 32, 36, 38, 39, 57
Draper v. Washington, 372 U.S. 487 (1963) 30
Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969) 61
Entsminger v. Iowa, 386 U.S. 748 (1967) 30
Eskridge v. Washington State Board, 357 U.S. 214 (1958) 30
Fornaris v. Ridge Tool Co., 400 U.S. 41 (1970) 59
Frost and Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583 (1926) 18
Garrity v. New Jersey, 385 U.S. 493 (1967) 18
Gomillion v. Lightfoot, 364 U.S. 339 (1960) 46
Griffin v. Illinois, 351 U.S. 12 (1956) 22, 28, 29, 30, 31, 32, 36, 38, 39, 46, 57
Griffin v. School Board of Prince Edward County, 377 U.S. 218 (1964) 46
Griswold v. Connecticut, 381 U.S. 479 (1965) 35
Hague v. CIO, 307 U.S. 496 (1939) 61
Hall v. Beals, 396 U.S. 45 (1967) 36
Hall v. Garson, 430 F.2d 430 (5th Cir. 1970) 62
Hall v. St. Helena Parish School Board, 197 F. Supp. 649 (E.D. La. 1961), *aff'd*, 368 U.S. 516 (1962) ...34, 46
Hargrave v. McKinney, 413 F.2d 320 (5th Cir. 1969) .15, 55
Harman v. Forssenius, 380 U.S. 528 (1965) 60, 64, 65
Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966) 22, 23, 24, 25, 26, 27, 28, 31, 32, 36, 38, 57
Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd, sub nom.*, Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) 39
Illinois v. Board of Education, 333 U.S. 203 (1948) 33
In Re Antazo, 89 Cal. Rptr. 255, 473 P.2d 999 (1970) .. 39
Kramer v. Union Free School District, 395 U.S. 621 (1969) 8, 22, 35
Lane v. Brown, 372 U.S. 477 (1963) 30
Long v. District Court, 388 U.S. 192 (1966) 30
McDonald v. Board of Election Commissioners, 394 U.S. 802 (1969) 23, 24, 35, 38

Page

McGowan v. Maryland, 366 U.S. 420 (1961) 56
McInnis v. Ogilvie, 394 U.S. 322 (1969), *aff'g mem.*, McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968) 20, 21, 32, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 59
McLaughlin v. Florida, 379 U.S. 184 (1964) 23, 46
McMillan v. Garlick, 430 F.2d 1145 (2d Cir. 1970) 55
McNeese v. Board of Education, 373 U.S. 668 (1963) 17, 60, 61
Minersville School District v. Gobitis, 310 U.S. 586 (1940) 56
Monroe v. Pape, 365 U.S. 167 (1961) 17, 60, 61
Mullane v. Central Hanover Bank and Trust Co., 399 U.S. 306 (1950) 45
Oregon v. Mitchell, 39 U.S.L.W. 4037 (decided December 22, 1970) 40
Parish School Board St. Charles v. Stewart, 39 U.S.L.W. 3199 (decided November 10, 1970) 8
Phoenix v. Kolodziejski, 399 U.S. 204 (1970) 8
Reetz v. Bonzanich, 397 U.S. 82 (1970) ..17, 18, 60, 61, 62, 63
Reynolds v. Sims, 377 U.S. 533 (1964) 31, 33, 36, 46
Roberts v. La Vallee, 389 U.S. 40 (1967) 30
Sanks v. Georgia, No. 28, Oct. T., 1970 38
School Board of Broward County v. Christian, No. 69-932, 2d Judicial Circuit, Florida 63
Serrano v. Priest, Civ. No. 35017 (Calif. Ct. App., 2d Dist., decided September 1, 1970) 55
Shapiro v. Thompson, 394 U.S. 618 (1969) ..6, 18, 19, 21, 22, 23, 31, 35, 37, 38, 39, 44, 58
Shelton v. Tucker, 364 U.S. 479 (1960) 45
Sherbert v. Verner, 374 U.S. 398 (1963) 18, 45
Skinner v. Oklahoma, 316 U.S. 535 (1942) 35
Smith v. Bennett, 365 U.S. 708 (1961) 30
Speiser v. Randall, 357 U.S. 513 (1958) 18
Swenson v. Bosler, 386 U.S. 258 (1967) 30
Talley v. California, 362 U.S. 60 (1960) 45
Tate v. Short, No. 324, Oct. T., 1970 38
Turner v. Fouche, 396 U.S. 346 (1970) 45
West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 56
Williams v. Illinois, 399 U.S. 235 (1970) ...24, 30, 39, 45, 46

Page

Williams v. Oklahoma City, 392 U.S. 458 (1969) 30
Williams v. Rhodes, 393 U.S. 23 (1968) 36, 46, 47
Wisconsin v. Constantineau, 39 U.S.L.W. 4128 (decided January 19, 1971) 18, 59, 62, 63
Wyman v. James, 39 U.S.L.W. 4085 (decided January 12, 1971) 33, 43
Yick Wo v. Hopkins, 118 U.S. 356 (1886) 31, 46
Zwickler v. Koota, 389 U.S. 241 (1967) 60

FEDERAL CONSTITUTION:

United States Constitution, Amendment XIV 3, 24, 48, 60, 63

FEDERAL STATUTES:

28 U.S.C. § 1253 2

42 U.S.C. § 1983 ..... 17, 62, 63

STATE CONSTITUTION:

Florida Constitution:

Article VII, § 9 ..... 8, 68
Article IX, § 4(a) 9
Article XII, § 8 8
Article XII, § 10 9

STATE STATUTES:

Florida Statutes:

Section 230.34(1) 9
Section 230.761(2) 11
Section 232.01-.45 36
Section 232.09 36
Section 232.19 36
Section 236.01-.071 7
Section 236.04 7
Section 236.075 ..... 67, 69

Page

Section 236.07(10) 7, 67

Section 236.29 11

Section 236.31 8

Section 236.32 9

Section 236.33 10

Section 236.53 11

Section 236.251 ..... 3, 15, 67, 68

Section 237.13 11

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Page

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v.

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On Appeal From the United States District Court for the Middle District of Florida

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BRIEF FOR APPELLEES

OPINIONS BELOW

The opinion of the three-judge district court from which this appeal is taken is reported at 313 F. Supp. 944 (App. 44-54). This suit was initially dismissed by a single district judge, whose order is contained in footnote 2 to the opinion of the Fifth Circuit rendered on appeal from the order of dismissal. *Sub nom.*, *Hargrave* v. *McKinney*, 413 F.2d 320, n. 2. The opinion of the Court of Appeals for the Fifth Circuit re-

versing the single judge's dismissal of the complaint and ordering the convening of a three-judge court is, as indicated above, reported at 413 F.2d 320. Chief Judge Brown wrote an additional opinion specifically ordering the convening of a three-judge court in this case. That opinion is reported at 302 F. Supp. 1381.

JURISDICTION

The judgment of the three-judge district court was entered on May 8, 1970 (App. 53). Notice of appeal was filed on June 3, 1970 (App. 55-56). Appellants' Jurisdictional Statement was filed on August 21, 1970. Probable jurisdiction was noted on November 9, 1970. The jurisdiction of this Court rests on 28 U.S.C. § 1253.

QUESTION PRESENTED

A Florida statute known as the Millage Rollback Act provides that any Florida county that imposes on itself more than 10 mills *ad valorem* property taxes for educational purposes will not be eligible to receive state funds for the support of its public education system.

The question presented is whether the Millage Rollback Act violates the equal protection clause of the Fourteenth Amendment as a discrimination based on wealth, because it distributes taxing authority for educational purposes by a standard related solely to the wealth of the county (i.e., the value of the property in the county), and in effect allows the wealthiest Florida county to tax itself up to $725 per pupil without losing state support for its public education system, while limiting the poorest Florida county to $52 per pupil on pain of losing state support for its public education system.

STATUTE INVOLVED

The Millage Rollback Act, Section 23, Chapter 68-18 Florida Laws, enacted at the Extraordinary Session of 1968 of the Florida Legislature, provides in pertinent part as follows:

> Effective July 1, 1968, each county board of public instruction desiring to participate in the minimum foundation program for kindergartens and grades one through twelve shall levy no more than ten mills of tax on the non-exempt assessed valuation of the county, exclusive of voted district building and bus, required debt service, and the millage required for junior college minimum effort.

The text of the entire statute as enacted is set forth in Appendix A hereto. Since the decision of the three-judge court, the Millage Rollback Act has been amended in respects not relevant to this litigation. In Appendix B we have set forth the text of the Millage Rollback Act, now F.S.A. § 236.251, showing, by brackets and italics, the act as originally enacted and as amended.

STATEMENT

This suit attacks, under the equal protection clause of the Fourteenth Amendment, the constitutionality of a Florida statute (the "Millage Rollback Act") which provides that any county imposing on itself more than 10 mills in *ad valorem* property taxes for educational purposes will not be eligible to receive state funds for the support of its public education system. Appellees[1] (plaintiffs below) seek to enjoin appel-

[1] Appellees are parents, taxpayers and students from 16 Florida counties which have been adversely affected by the Millage Rollback Act, i.e., which have been forced by the Act to reduce their tax rates in order to avoid losing state support for their education system.

lants[2] (defendants below) from withholding state education funds from any county because it taxes itself in excess of the limit imposed by the Millage Rollback Act.

Appellees contend that the Millage Rollback Act draws an impermissible line based on wealth, allowing, as it does, the imposition of $725 per pupil of education taxes in Florida's wealthiest county and only $52 per pupil in Florida's poorest county. Thus the Act prevents a poor county from providing as good an education for its children as the wealthier counties provide even if the poor county is willing to sacrifice to reach this goal by imposing on itself a higher education tax rate than is imposed in wealthier counties.

Prior to the passage of the Millage Rollback Act, 24 Florida counties had imposed on themselves taxes for the 1967-68 school year in excess of 10 mills. The Millage Rollback Act, passed in February 1968,[3] required each of these counties to reduce its school taxes to 10 mills[4] for subsequent years if it was to avoid losing state funds. Accordingly, for the 1968-69 school year, each of these 24 counties did reduce its taxes for

[2] Appellants are members of the State Board of Education, the State Commissioner of Education, and the State Comptroller. The State Board of Education and the State Commissioner of Education compute the amount of money each county is to receive from the state. They do this according to an elaborate formula which is part of the state's Minimum Foundation Program. The Comptroller actually distributes the money to the counties. (See Amended Complaint, paragraph 4, App. 4).

[3] And amended in respects irrelevant to this lawsuit in 1970. See Appendix B.

[4] Plus certain minor adjustments known as "DB&B", to be subsequently discussed.

educational purposes to the 10-mill limit imposed by the Act.

Appellees' position below and here is that this limit on the authority of counties to tax themselves for educational purposes violates the equal protection clause because the limitation is fixed by reference to a standard which relates solely to the amount of property in the county (i.e., wealth), not to the educational needs of the county. Counties with high property values in relation to their school population are authorized by the state to tax themselves far more in relation to their educational needs than counties with low property values in relation to their school population.[5] We argue that to limit the extent to which a county may tax itself to provide for its educational needs by reference to the amount of property in the county, which amount is wholly unrelated to the educational needs of the county, surely promotes no compelling state interest; and lacks even a reasonable basis.

In a unanimous opinion invalidating the Florida statute, Circuit Judge Dyer stated:

> What apparently is arcane to the defendants is lucid to us—that the [Millage Rollback] Act prevents the poor counties from providing *from their own taxes* the same support for public education which the wealthy counties are able to provide.
>
> . . . .

[5] Thus, Charlotte County may raise by its own taxes $725 per student, while Bradford County is permitted by the State to raise only $52 per student. See Column 10 of Exhibit D to the Amended Complaint (App. 25-26)). This variation stems from the fact that the tax base per child varies from $5,239 in Bradford County to $72,535 in Charlotte County (see Column 12 of Exhibit D to the Amended Complaint (App. 25-26)).

> What rational basis can be found for the distinctions that are inherent in the Act? Do they have any rational relationship to a legitimate state end or are they based on reasons totally unrelated to the pursuit of that goal? What interest has the State of Florida in preventing its poorer counties from providing as good an education for their children as its richer counties? As postulated by the plaintiffs, "The legislature says to a county, 'You may not raise your own taxes to improve your own school system, even though that is what the voters of your county want to do.'" We have searched in vain for some legitimate state end for the discriminatory treatment imposed by the Act.
>
> While the state undoubtedly has a valid interest in preserving the fiscal integrity of its programs, and may legitimately attempt to limit its expenditures for public education, or any other purpose, it "may not accomplish such a purpose by invidious discrimination between classes of its citizens." *Shapiro v. Thompson*, 394 U.S. 618, 633, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) [313 F. Supp. at 947, 948; App. 48, 49-50; emphasis in original].

A. The Background: Financing Public Education in Florida

Florida provides financial support for the operation of its public schools in two ways.[6] The first source is Minimum Foundation Program funds which are appropriated by the state from state-wide taxes and distributed to each county according to a somewhat

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[6] Amended Complaint, paragraph 5 and 6, App. 4-6. The answer (App. 27-28) admits substantially all of the factual allegations of the Amended Complaint and the allegations relating to the legal background of educational financing in Florida. References to the Amended Complaint may therefore be taken to be references to allegations which have been admitted. Appellants in their brief (Br. 2-3) specifically adopt the complaint's description of Florida's method of financing public education.

complicated formula. This formula is based on, and varies with, certain indices of the educational needs of the particular county[7] and is, accordingly, not here under attack.[8]

The second source of funds for the support of public education in Florida is local, as opposed to statewide, taxation.[9] Local taxes are of two kinds. The first is so-called "County Millage", and the second is so-called "District Millage."[10] County Millage, which may be levied up to a maximum of 10 mills, is imposed by the School Board without prior voter authorization. District Millage, on the other hand, is subject to no maximum limit provided it is first authorized, for no

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[7] Amended Complaint, paragraphs 5, 8-11, App. 4-10.

[8] Briefly, the Minimum Foundation Program as a whole is a body of rules for calculating the total cost of funding a minimal educational system in the county (F.S.A. §§ 236.01-236.071). The total cost of a Minimum Foundation Program for each county is determined by reference to the number of Instruction Units of which the county public educational system is comprised. Instruction Units, in turn, are based on a number of factors indicative of educational need, but primarily on the number of students in average daily attendance (F.S.A. § 236.04). From the resulting amount, there is deducted a certain minimum sum which each county is expected to raise for itself if it wishes to receive so-called MFP funds from the state (F.S.A. § 236.07(10)). After the deduction of this minimum sum, the remainder is the amount of MFP funds which the state allocates to each county (F.S.A. § 236.07(10)). As a practical matter, each Florida county has taxed itself in excess of the minimum sum which is required if a county is to be eligible for MFP funds (See Exhibit C to Amended Complaint, App. 23-24). This is so because each county must expend more than the amount of a Minimum Foundation Program in order to provide an even colorably decent education for its children (Amended Complaint, paragraph 12, (App. 10)).

[9] Amended Complaint, paragraph 6, App. 5-6.

[10] *Ibid.*

more than two years at a time, by a vote of the freeholders paying taxes.[11] To the extent authorized, it may then be imposed by the School Board. Both County Millage and District Millage are provided for in the Florida Constitution.[12]

The qualified voters in each county thus vote for District Millage every two years (F.S.A. § 236.31),

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[11] The provision of the Florida Constitution limiting the franchise to freeholders is obviously unconstitutional. *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969); *Cipriano* v. *City of Houma*, 393 U.S. 1061 (1969); *Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970); *Parish School Board St. Charles* v. *Stewart*, 39 U.S.L.W. 3199 (decided November 9, 1970). However, this provision is not under attack here.

[12] County Millage is authorized in Fla. Const. Art. VII § 9 (as amended 1968) which provides in pertinent part:

> (a) Counties, school districts, and municipalities shall . . . be authorized . . . to levy ad valorem taxes . . . for their respective purposes . . .
>
> (b) Ad valorem taxes . . . shall not be levied in excess of the following millages upon the assessed value of real estate and tangible personal property: . . . for all school purposes, ten mills . . .

Article XII, Section 8 of the prior Constitution (which was in force when the original complaint was filed) provided for County Millage in the following terms:

> Each county shall be required to assess and collect annually for the support of the public free schools therein, a tax of not less than three (3) mills, nor more than ten (10) mills on the dollar on all taxable property in the same.

The 1968 Constitution makes no provision for a 3 mill minimum. As to District Millage, the relevant portion of Fla. Const. Art. VII § 9 (as amended 1968) provides:

> (b) Ad valorem taxes, *exclusive of taxes levied for . . . periods not longer than two years when authorized by vote of the electors who are the owners of freeholds* . . . shall not

thereby authorizing District Millage at a specific maximum rate for the ensuing two-year period. These elections are held in odd-numbered years (*ibid.*). While the voters authorize District Millage for a two-year period, the extent to which District Millage is actually levied is determined by the School Board after consideration of its budgetary needs for the particular

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be levied in excess of [specified limits] . . . . [Emphasis supplied.]

The implication of the italicized portion is that *ad valorem* taxes for less than two years may, when authorized by the vote of freehold electors, be levied in any amount.

The analogous provision in the pre-1968 Constitution was Article XII, Section 10 which provided:

> The Legislature . . . may provide for the levying and collection of a district school tax, for the exclusive use of public free schools within the District whenever a majority of the qualified electors thereof that pay a tax on real or personal property shall vote in favor of such levy; Provided, that any tax authorized by this section shall not exceed 10 mills on the dollar in any one year on the taxable property of the district.

The 1968 Constitution sets no upper limit on the millage which can be authorized to be levied in this way.

Although in the pre-1968 Constitution, County Millage was imposed by the county and District Millage was imposed by the school tax district, the latter was by statute co-extensive with the boundaries of the county. See F.S.A. § 230.34(1). The substance of this statute is now included in the 1968 Constitution "Each county shall constitute a school district . . . ." Fla. Const. Art. IX § 4(a) (as amended 1968).

It should also be noted to round out the picture that the state legislative authorization which the *old* constitution required before District Millage could be voted on was given by F.S.A. § 236.33 which establishes procedures for the conduct of district millage elections.

school year involved (F.S.A. § 236.33).[13] Depending on those needs, the School Board may or may not exhaust the full authority to tax which is given to it by the voters.

In addition to state and local contributions to public education, the federal government also makes a contribution to public education in Florida of approximately 2 or 3 percent.[14]

B. The Millage Rollback Act and Its Effect

In its Extraordinary Session of 1968, the Florida legislature enacted into law Chapter 68-18, Florida Statutes. Section 23 of that law dictates that no county may receive its share of state MFP funds if its School Board levies more than 10 mills (plus certain adjustments) of local tax on the non-exempt property in the county.

In pertinent part, Section 23 provides as follows:

> *Effective July 1, 1968, each school board desiring to participate in the minimum foundation program for kindergartens and grades one through twelve shall levy no more than ten mills of tax on the non-exempt assessed valuation of the district,* exclusive of voted district building and bus, required debt service, and the millage required for junior college minimum effort.

From the italicized portion of the statute, it can be seen that the prohibition of the Rollback Act means that District and County Millages in any Florida Coun-

[13] See also Affidavit of Lee Young submitted in support of plaintiffs' motion for summary judgment (App. 37-39), hereinafter Young Affidavit.

[14] See Exhibit A to Amended Complaint, App. 19-21.

ty may not, in the aggregate, exceed the 10-mill limit, plus certain minor additional authorizations contained in the unitalicized portion of the Act. These additional authorizations, sometimes referred to as DB&B, are explained in a footnote.[15] As a practical matter, they add as much as 1.5 mills to the basic 10-mill ceiling.[16] However, as the court below noted, "Funds [for DB&B] are not involved in, nor are they material to, a determination of this cause" (App. 46). In short, while the Florida Constitution permits 10 mills to be levied as County Millage and an additional unlimited number of mills to be levied (for periods not longer than two years) as District Millage, the Rollback Act limits the aggregate levy of both to only 10 mills.

For the 1967-1968 school year, prior to the passage of the Millage Rollback Act, Florida counties had imposed on themselves between 4 mills (Liberty County) and 17 mills (Pinellas County) of taxes, both County Millage and District Millage.[17] Obviously any county which imposed more than 10 mills had the authorization of its voters to impose at least that much additional

[15] The unitalicized part of the statute refers to statutes pursuant to which counties are required to raise by taxation additional moneys for district building and bus funds (F.S.A. § 237.13), for required debt service on school bond issues (F.S.A. §§ 236.29 and 236.53), and for the county share of junior college support funds (F.S.A. § 230.761(2)). In 1970 the Florida legislature also excepted from the 10-mill limit millage certain other minor amounts. See Appendix B. However, as appellants point out, "[S]uch exceptions are not really material to the issues of this case" (Br. 3).

[16] See Column 2b of Exhibit D to the Amended Complaint, App. 25-26.

[17] See Column 1 of Exhibit D to Amended Complaint, App. 25-26.

millage. The voters in 24 counties had authorized their School Board to impose District Millage in addition to the 10 mills of County Millage.

Although the voted biennial additional authorization in these 24 counties applied to the 1968-69 school year, each of these 24 counties nevertheless rolled back its millage for the 1968-69 school year in order to avoid losing state MFP funds under the terms of the Millage Rollback Act. In effect, all of these counties heeded the warning of the Millage Rollback Act which says to them, "The State will provide substantial assistance for your local education system on condition that you do not provide too much money yourself. If you do provide for yourself more than we think you should, we will not give you any state MFP money. And the standard by which you must limit yourself is based not on your educational need nor on the priority which you place on education, but only on the amount of property (i.e., wealth) in your county."

The effect of the Millage Rollback Act in 1968-69 was to reduce sharply the amount of money which local counties could raise for themselves. Measured by the reduction in millage from the year preceding the enactment of the Millage Rollback Act (1967-68), the loss was well in excess of $50,000,000. A breakdown of this amount is contained in the following memorandum dated January 6, 1969, prepared by defendant Floyd T. Christian, Commissioner of Education:[18]

[18] Our figures differ somewhat from Dr. Christian's (See Column 10 of Exhibit 1 to Young Affidavit, App. 40-41), but the precise amount is unimportant. Dr. Christian's Memorandum appears as Exhibit 1 to Affidavit of Hershel Shanks submitted in support of plaintiffs' motion for summary judgment (App. 30-31), hereinafter "Shanks Affidavit".

The following counties have enforced millage reductions in 1968-69:

County	1967-68 Operating Millage	1968-69 Operating Millage	Enforced Millage Decrease	Approximate Dollar Reduction
Alachua	13.0	10.60	2.40	$ 802,517
Brevard	14.88	11.29	3.59	2,921,310
Broward	10.67	10.24	.43	1,312,304
Collier	11.45	10.00	-0-*	
Columbia	11.729	10.00	1.729	135,953
Dade	12.32	10.28	2.04	12,812,703
Dixie	14.874	10.8737	4.0003	77,867
Duval	15.8963	10.6701	5.2262	8,899,894
Escambia	13.183	10.00	-0-*	
Gadsden	15.50	10.45	5.05	343,313
Gulf	13.30	10.59	2.71	108,410
Hernando	12.868	10.00	2.868	235,342
Hillsborough	14.206	10.00	4.206	6,609,052
Leon	11.762	10.00	1.762	635,173
Manatee	12.00	10.46	1.54	485,479
Nassau	12.42	10.86	1.56	114,887
Orange	14.80	10.40	4.40	5,343,076
Pasco	11.425	10.00	1.425	263,289
Pinellas	17.00	10.65	6.35	9,481,993
Putnam	14.271	11.47	2.801	354,447
Seminole	12.75	10.44	2.31	549,573
Taylor	11.6196	10.2593	1.3603	90,050
Volusia	14.65	10.8936	3.7564	2,449,349
Walton	12.00	11.00	1.00	48,930
				$54,074,911

* Freeholders voted zero district millage for 1968-69 and 1969-70.

Dr. Christian also notes in his memorandum:

> The effect of the ten-mill limitation creates a restriction on the amount of local support which certain counties can provide for the educational program.
>
> The expression of the freeholders in the local millage election is being negated in those cases where there is a desire to provide a greater amount of local support for the education program [App. 32].

The precise effect of the Millage Rollback Act varies considerably from county to county. In some counties, it merely prevents the county from improving its educational system to the extent its voters have authorized. In at least one county, however, the School Board had difficulty even preparing a budget. On August 15, 1969, the Superintendent of the Broward County Schools wrote Dr. Christian as follows:

> The Board of Public Instruction of Broward County, meeting in regular session on August 14th, passed a resolution stating that the Board can not balance its budget for the 1969-70 school year without exceeding the 10-mill cap imposed by the last legislature.
>
> It is impossible for us to submit a budget unless your office agrees that we may include millage funds exceeding 10-mills. Will you please advise us immediately whether or not a budget prepared which includes funds exceeding 10 mills will be accepted by your office.[19]

Dr. Christian's reply is as follows:

> In response to your letter of August 15 in which you presented the dilemma the District School Board in Broward County faces in developing an adequate school budget for 1969-70 in light of the

[19] Exhibit 2 to Shanks Affidavit, App. 33.

limitations of the 10-mill cap, the following information submitted.

> The responsibilities of this office in executing the statutes currently in existence would not permit a budget to be officially approved which included a levy of ad valorem tax in excess of those levies authorized in Section 236.251, Florida Statutes. Therefore, the Annual School Budget for 1969-70 must be developed to comply with this restriction if the district is to continue participation in the Minimum Foundation Program for Kindergarten and Grades 1-12.
>
> I recognize the severe financial difficulties which have resulted from recently enacted statutory provisions, however, there were no alternatives or discretionary authorities provided this office in administering the state and local funds for support of public schools.[20]

C. The Procedural History of This Case

The complaint in this case was filed October 31, 1968. (App. 1). Thereafter, on December 13, 1968, a single district judge granted the defendants' motion to dismiss on jurisdictional grounds without ruling on the substantiality of the merits of plaintiffs' constitutional claim (App. 1; see *Hargrave* v. *McKinney*, 413 F.2d 320, n. 2 (5th Cir. 1969)).

On appeal, the Fifth Circuit reversed the District Court's jurisdictional rulings, and then faced the question whether plaintiffs had presented a substantial constitutional claim. The Court of Appeals held that the complaint did in fact present a substantial constitutional question. *Hargrave* v. *McKinney*, 413 F.2d 320 (5th Cir. 1969). But, since that Court had no jurisdiction to pass on the merits, it refrained from ex-

[20] Exhibit 3 to Shanks Affidavit, App. 34-35.

pressing any views thereon, and remanded with directions to convene a three-judge district court.

After plaintiffs filed an amended complaint, adding certain additional defendants and deleting a prayer to require the collection of back taxes (App. 3-26), defendants filed an answer admitting substantially all of the factual allegations of the amended complaint, as well as its description of the legal background of financing public education in Florida (App. 27-28). Promptly thereafter, both plaintiffs and defendants filed cross-motions for summary judgment (App. 35-36, 43).

In a unanimous opinion carefully analyzing the constitutional violation, the three-judge district court granted plaintiffs' motion and denied defendants' motion (App. 44-54). This appeal followed (App. 55-56).

SUMMARY OF ARGUMENT

I

The Millage Rollback Act, together with other Florida statutes, authorizes Florida counties to tax themselves for a portion of the money required to support their public education systems, but limits this authority by a standard based on the value of the property in each county. We believe that this kind of limitation violates the equal protection clause. Such a limitation is just as unconstitutional as a system which would make the amount of the state education appropriation to each county—rather than the amount of taxing authority—depend on the value of the property within each county.

In our more detailed analysis, we first ask whether our equal protection claim should be reviewed pursuant to the "compelling interest" test or the "reasonable basis" test. We argue that the "compelling interest" test is applicable because the Millage Roll-

back Act allocates authority to tax on the basis of wealth. Our conclusion that the "compelling interest" test must be applied here is reinforced by a consideration of the governmental benefit in connection with which the distinction is drawn—namely, the allocation of educational resources. Surely the "compelling interest" test is applicable to a discrimination based on wealth in the allocation of educational resources.

The Millage Rollback Act not only fails to meet the "compelling interest" test, but lacks even a reasonable basis. Appellants attempt to justify the Millage Rollback Act on the ground that a limitation on the local tax rate was the necessary political price that had to be paid for an increase in state education funds. Such a justification will not pass constitutional muster. Florida may limit its expenditures for public schools, but not by a standard related to the wealth of the local community; and it offers no saving grace that this unconstitutional tax limitation was tied to an increase in state funds for education. This is especially so because of the many alternative methods that are easily available for limiting educational expenditures that are *not* tied to an unconstitutional wealth standard.

II

Abstention would be inappropriate in this case. First, there is no uncertainty in the state statute under attack which might modify or avoid the federal constitutional question; the Millage Rollback Act speaks with utter clarity. Second, the possibility of obtaining relief in a state court on state-law grounds is not a sufficient predicate for an abstention order, certainly in a case, like the instant one, brought under 42 U.S.C. § 1983. *Monroe* v. *Pape*, 365 U.S. 167 (1961); *McNeese* v. *Board of Education*, 373 U.S. 668 (1963). Appellants reliance on *Reetz* v. *Bozanich*, 397 U.S. 82

(1970), is misplaced. *Rectz*, unlike the instant case, was not based on Section 1983. Moreover, the recent case of *Wisconsin* v. *Constantineau*, decided January 19, 1971, suggests that *Rectz* must be read only as reaffirming the rule that an uncertainty in the statute under attack will lead to abstention, a principal which does not apply here. In addition, the result in *Rectz* may well be accounted for on the ground that the plaintiffs there pressed their state-law claim in the federal court, side by side with their federal constitutional claim. Here appellees have pressed only their federal claim. Moreover, appellants have not even identified the state-law ground on which they contend appellees might obtain relief.

ARGUMENT

I. THE MILLAGE ROLLBACK ACT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

A. An Analysis of the Equal Protection Violation

The Millage Rollback Act classifies counties according to the size of their tax bases, and by this standard limits the authority of counties to tax themselves for educational purposes.[21] Such a classification is wholly

[21] The fact that Florida does not make its millage limitation an absolute prohibition, but instead conditions state MFP aid on compliance with the millage limitation, is constitutionally irrelevant. The doctrine that government may not grant a benefit or privilege on conditions requiring the recipient to relinquish his constitutional rights is well established. See, e.g., *Shapiro* v. *Thompson*, 394 U.S. 618, 627, n. 6 (1969); *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 894 (1961); *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963); *Speiser* v. *Randall*, 357 U.S. 513, 519-20 (1958); *Garrity* v. *New Jersey*, 385 U.S. 493, 499-500 (1967); *Chew* v. *Colding*, 344 U.S. 590, 597-598 (1953); *Frost and Frost Trucking Co.* v. *Railroad Comm'n*, 271 U.S. 583, 593-594 (1926). See Van Alstyne, "The Demise of the Right-Privilege Distinction in Constitutional Law," 81 Harv. L. Rev. 1439, 1445-54 (1968); Comment, "Another Look at Unconstitutional Conditions," 117 U. Pa. L. Rev. 144 (1968).

unrelated to the purpose for which the state authorizes its counties to tax themselves—to educate Florida children.

The arbitrary nature of the Millage Rollback Act may be highlighted by comparing it to a hypothetical case. Let us suppose that the State of Florida passed a statute by which state funds for the support of public education were appropriated to each county on the basis of the value of the property in that county. Let us further suppose that the statute provided for an appropriation to each county equal to 1% of the county's tax base for the previous year. Thus, County A with a tax base of $500 million would get $5 million to operate its school system, while County B with a lower tax base of $100 million would get only $1 million. Unquestionably this hypothetical legislation would be unconstitutional.[22] The Millage Rollback Act is just as clearly unconstitutional. Instead of appropriating money on an unconstitutional basis, the Rollback Act appropriates authority to the counties to tax themselves for the support of their public schools—and does so on the same unconstitutional basis. Put another way, instead of merely appropriating state money to the county in an amount determined by a fixed percentage of the property value in the county, the Rollback Act places a limitation or ceiling on the "appropriation" of a county to itself. A limitation or ceiling is imposed on the percentage (millage) which a county,

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[22] *Cf.* the language of the Supreme Court in *Shapiro v. Thompson*, 394 U.S. 618, 632-33 (1969):

> [Appellants' argument] would permit the state to apportion all benefits and services according to past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services.

by its *own* taxation, may apply to its *own* tax base to raise money for purposes of public education. The Millage Rollback Act thus involves precisely the same unconstitutional basis as is involved in the hypothetical case. For under both the amount of revenue which may be produced for education is determined by reference to a wholly arbitrary standard, namely the amount of property in the county, not the educational needs of the county.[23]

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[23] We have used the concept of "educational needs" here to include all constitutionally valid standards by which Florida might decide to allocate authority to tax. Florida's range of choice is indeed wide. It could allocate, for example, on the basis of dollars per pupil, though this is by no means the only constitutionally valid standard. It could also allocate by taking into account the numerous other factors which Florida has already incorporated into the concept of Instruction Units as used in its MFP program. See footnote 8, *supra*, p. 7. The standard could also consider the county's willingness to adopt special instruction and guidance programs, special problems of urban schools, the dispersion of students within a district, special educational problems that result because a system is very large or very small, etc. In short, any standard related to the county's "educational needs." We characterize this extensive constitutionally permissible area, which does not use wealth as a basis of allocation, as a standard based on "educational needs." See Coons, Clune and Sugarman, *Private Wealth and Public Education* (1970); Shanks, Book Review, 84 Harv. L. Rev. 257, 259-260. The vice of the present standard is that it is based on wealth. The state may *not* use wealth as a standard for allocating authority to tax.

Our use of the concept of "educational needs" here is in sharp contrast to the use of that concept in *McInnis* v. *Ogilvie*, see *infra*, p. 53. In *McInnis*, the plaintiffs sought to obtain an order from the court allocating educational resources according to individual students' educational needs. Unlike the *McInnis* plaintiffs, we do not contend that the state must affirmatively allocate educational resources on the basis of some single, though undefined standard of educational need. Our argument is a negative one;

B. The Choice of a Standard of Review

Following this Court's approach in *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), we shall first consider whether the standard of review of the equal protection claim presented here should be the "reasonable basis" test or the more exacting "compelling interest" test.[24] Again following *Shapiro* v. *Thompson*, we shall do so even though we contend that the distinction drawn by the statute under attack here does not meet even the "reasonable basis" test.[25]

In determining which test is applicable—and indeed in determining whether or not the distinction drawn by

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however the allocation is made. It may not be made on the basis of wealth. For the *McInnis* plaintiffs "educational need" was a single undefined standard which was constitutionally required; for us "educational need" is that large area of discretion which is constitutionally permitted in the allocation of educational resources, so long as such resources are not allocated on the basis of wealth or other invidious distinction.

[24] In *Shapiro* v. *Thompson*, the Court chose to elaborate the so-called "compelling interest" test in greater detail than had ever previously been done, even though this was not necessary to the decision inasmuch as the Court found that the distinction drawn in that case did not satisfy the "reasonable basis" test. The logical reason for the discussion of the "compelling interest" test in *Shapiro* was to provide guidance to the bench and bar regarding the applicable standards of review in equal protection cases, and, in fact, the discussion in *Shapiro* has had far-reaching significance in delineating the parameters of subsequent equal protection problems.

[25] The court below found that the Millage Rollback Act did not meet even the "reasonable basis" test. It did not reach the question as to whether the "compelling interest" test was applicable.

> Having concluded that there is no rational basis for the distinction which the legislature has drawn, . . . we do not reach the more exacting "compelling interest" approach [App. 50].

the statute meets the applicable test—it is necessary to focus on two factors: (1) The differentiating classification,[26] and (2) the nature of the benefit or burden which is being differentially distributed by government, depending on the way a party is classified under the first factor. In the case at bar, the differentiating classification is wealth. In other cases it has been length of residence (which restricted the right to travel) (*Shapiro* v. *Thompson, supra*), race (*Brown* v. *Board of Education*, 347 U.S. 483 (1954)), or ownership of property (*Kramer* v. *Union Free School District*, 395 U.S. 621 (1969)). The benefit being differentially distributed here is taxing authority for educational purposes, the amount of which is dependent upon the wealth of the county. In other cases the benefit or burden differentially distributed has been the franchise (*Harper* v. *Virginia State Board of Commissioners*, 383 U.S. 663 (1966)), the opportunity to appeal a criminal conviction (*Griffin* v. *Illinois*, 351 U.S. 12 (1956)), or the receipt of welfare payments (*Shapiro* v. *Thompson, supra*)).

We believe that the "compelling interest" test is applicable here simply because the differentiating classification is wealth. However, it is clear beyond doubt that the "compelling interest" test is applicable where, as here, wealth is used as the basis for differentially distributing authority to tax for educational purposes. The following two sections of our brief are devoted to demonstrating these two propositions.

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[26] The phrase is Mr. Justice Harlan's. *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 681 (dissenting opinion). Coons et al. have referred to the same concept as "the classifying fact". Coons, Clune and Sugarman, *Private Wealth and Public Education* (Harvard University Press 1970), p. 342.

C. The "Compelling Interest" Test Is Applicable Because the Millage Rollback Act Classifies Counties According to Wealth

In *McDonald* v. *Board of Election Commissioners*, 394 U.S. 802 (1969), decided a week after *Shapiro* v. *Thompson*, *supra*, this Court discussed the kinds of cases to which the "compelling interest" test is applicable. This discussion makes clear that a classification based on wealth will, in and of itself, render governmental action predicated on that classification subject to the more stringent standard of review of the "compelling interest" test. The Court's analysis in *McDonald* followed the same steps it had taken the week before in *Shapiro*, first considering which standard of review was applicable, and then considering whether the facts presented met the applicable test. The Court stated:

> Before confronting appellants' challenge to Illinois' absentee [voting] provisions, we must determine initially how stringent a standard to use in evaluating the classifications made thereunder and whether the distinctions must be justified by a compelling state interest . . . . [A] careful examination on our part is especially warranted where lines are drawn on the basis of *wealth* or race, *Harper* v. *Virginia Board of Elections*, [383 U.S. 663 (1966)] *two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny. Douglas* v. *California*, 372 U.S. 353 (1963); *McLaughlin* v. *Florida*, 379 U.S. 184, 192 (1964) [394 U.S. at 806-07; emphasis supplied].

The Court's citation to the *Harper* and *Douglas* cases indicated its view that these cases involved discriminations based upon wealth and that for this reason the Court applied the more stringent "compelling interest" test. While we agree that the Court exercised a more

exacting judicial scrutiny in these cases, we are not as clear as the *McDonald* Court appears to have been that *Harper* and *Douglas* did indeed involve wealth discrimination in the narrowest meaning of the term,[27] i.e., wealth as opposed to a discrimination based on ability to pay. Because the case at bar does involve a wealth discrimination in its narrowest meaning, we believe our case is even stronger than *Harper* and *Douglas*.

In *Harper* and *Douglas* the Court had under review classifications which were based, strictly speaking, not on wealth, but on ability to pay (or on payment of a fee). The effect, of course, may be the same regardless of whether the discrimination is based on wealth or ability to pay.[28] The poor person frequently does not have the ability to pay. However, for purposes of legal theory, it is useful to distinguish between the two. A law prohibiting all people earning less than $3,000 per year from using a public park is a discrimination based on wealth; one forbidding entry to a park unless a $3 admission fee is paid is a discrimination based on ability to pay.

In *Harper* the Court struck down a $1.50 poll tax. The Court stated:

> A State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter *or* payment of any fee an

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[27] However, the citations to *Harper* and *Douglas* in the *McDonald* case may refer only to dicta; rather than holding, to the effect that wealth discriminations are invidious, without distinguishing between wealth discrimination and discrimination based on ability to pay. See the quotations from *Harper* and *Douglas*, *infra*, pp. 24-25, 29-30.

[28] See *Williams* v. *Illinois*, 399 U.S. 235, 242 (1970).

> electoral standard. Voter qualifications have no relation to wealth [383 U.S. at 666; emphasis supplied].
>
> * * *
>
> Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored. To introduce wealth *or* payment of a fee as a measure of a voter's qualification is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant in this context—that is, as a condition of obtaining a ballot—the requirement of fee paying causes an "invidious" discrimination that runs afoul of the Equal Protection Clause [383 U.S. at 668; citations omitted; emphasis supplied].
>
> * * *
>
> [W]*ealth or fee paying* has, in our view, no relation to voting qualifications [383 U.S. at 670; emphasis supplied].

Rich and poor alike were charged the $1.50 poll tax. The statute did not say to the poor man who manages by dint of great sacrifice to come up with the $1.50 poll tax, "You are not permitted to pay the $1.50 poll tax." The indigent citizen in *Harper* was denied the franchise only if he did not have the $1.50.[29] The state would clearly have accepted the fee from an indigent person who was willing to pay the fee. Strictly speaking, therefore, the statute discriminated on the basis of ability to pay, rather than wealth, although the effect may be and often is the same; namely, to wence out indigent voters.

[29] Of course the poll tax served as a depressant even to those who had the $1.50 but for whom payment was a greater sacrifice than for the wealthy. It is interesting to note, in this connection that the plaintiffs in *Harper* made no argument that they could not afford to pay the poll tax; they had standing even though they were not indigent.

This is obviously not to say, or even suggest, that *Harper* was wrongly decided. There are situations, of which *Harper* is one, where it is unconstitutional for government to discriminate even on the basis of ability to pay. Conversely, it is equally obvious that while all fee-paying requirements do discriminate on the basis of ability to pay, all such requirements are *not* unconstitutional. For example, it would be difficult to argue that the annual $25 fee, which the District of Columbia charges to practice law, violates the equal protection clause. To determine when a discrimination based on ability to pay violates the equal protection clause, we must examine the nature of the benefit which is being differentially distributed on the basis of ability to pay. In *Harper*, the benefit which was differentially distributed based on ability to pay was the franchise; the Court properly placed such great value on the franchise that it found that stringent review was required, and the state was not able to meet its burden of justification under this standard of review. We heartily agree with this conclusion.

However, the significance of *Harper* for the case at bar is that, by comparison, plaintiffs here have an even stronger case than the *Harper* plaintiffs. It does not matter whether a poor Florida county is willing to sacrifice in order to provide as good an education for its children as a wealthy county is able to provide; the poor county is nevertheless prevented from doing so, not because it cannot pay—we hypothesize that it is willing to sacrifice to make the payment[20] —but only because of its status as a poor county.

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[20] This hypothesis is supported by the fact that prior to the passage of the Millage Rollback Act, 24 Florida counties had imposed on themselves a higher tax rate than is permitted by the Millage Rollback Act. *See, supra*, p. 13.

Moreover, because *Harper* involved a classification based on ability to pay, rather than wealth, it required an examination of the nature of the benefit which was being differentially distributed on the basis of ability to pay. In our case the basis of discrimination is simply wealth rather than ability to pay. Accordingly, it is unnecessary here, just as it is unnecessary in a race case, to examine the nature of the benefit which the state is differentially distributing. The "compelling interest" test is applicable to a racial classification even when testing rules as to who may drink at a public fountain. Once a racial classification is drawn, it is unnecessary to ask for what purpose.[31] Similarly, in wealth discrimination cases, it does not matter for what purpose the distinction is drawn,[32] whether entrance to a park, entrance to a profession, availability of educational resources or the franchise.

Thus, while *Harper* involved a discrimination based on ability to pay, and hence required the Court to

[31] However, the application of the "compelling interest" test does not lead to a *per se* rule condemning all racial classifications. In some cases the state may be able to meet the burden of establishing a compelling state interest. It may be able to do this, for example, in the case of so-called benign racial classifications. See "Developments in the Law—Equal Protection," 82 Harv. L. Rev. 1065, 1104-1120 (1969).

[32] Again, the application of the "compelling interest" test does not lead to a *per se* rule condemning all wealth discriminations. As there are benign racial classifications, so there are benign wealth classifications, such as welfare payments (which discriminate in favor of the poor) and graduated income tax (which discriminates against the rich). Such discriminations would meet the "compelling interest" test.

consider the nature and importance of the benefit being differentially distributed (i.e., the franchise), in our case the fact that the discrimination is based on wealth rather than ability to pay in itself ineluctably leads to the conclusion that the "compelling interest" test is applicable.[33]

Our analysis of *Douglas* v. *California*, 372 U.S. 353 (1963) is much the same as our analysis of the *Harper* case. *Douglas* is one of a line of cases beginning with *Griffin* v. *Illinois*, 351 U.S. 12 (1956), in which this Court has ruled that in criminal proceedings the state may not discriminate between defendants on the basis of their ability to pay.[34] In *Griffin* the Court found that Illinois had made the transcript of the trial a prerequisite for appeal in criminal cases. The effect was to deny appeals to indigents who were not able to pay for a transcript. However, the state had not said that no indigent could appeal; it simply offered transcripts to all defendants on ostensibly equal terms, at a price approximating its costs. Thus, the state discriminated on the basis of ability to pay, rather than on the basis of wealth.

[33] We may also add that dicta in the *Harper* case, already quoted, indicate that wealth is an invidious classification. See also nn. 34-36, *infra*.

[34] *Griffin*, like *Harper*, contains dicta to the effect that wealth discriminations are invidious:

> In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color.
>
> * * *
>
> It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all . . . But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty [351 U.S. at 17-18].

As Mr. Justice Goldberg has observed, the *Griffin* case "la[id] to rest the notion that equal protection requires only equal laws and that the state is never obliged to equalize economic disparities."[35] The teaching of *Griffin* is that even a discrimination based on ability to pay is sometimes unconstitutional—in the *Griffin* case because of the importance to the defendant of the criminal sanction involuntarily imposed upon him by the state.

The *Douglas* case involved a claim of denial of the equal protection by an indigent criminal defendant who could not afford counsel on appeal. Following *Griffin*, the Court held that to allow a criminal defendant to appeal from a conviction with the assistance of counsel only on the condition that he be able to pay for his counsel amounted to an unconstitutional discrimination based on ability to pay.[36] This Court refused to put its stamp of approval on a rule pursuant to which "the type of appeal a person is afforded . . .

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[35] Goldberg, "Equality and Governmental Action," 39 N.Y.U. L. Rev. 205, 218 (1964).

[36] As in the other cases we have been discussing, the Court in *Douglas* used some language which did not distinguish between a discrimination based on wealth and a discrimination based on ability to pay:

> There is lacking that equality demanded by the Fourteenth Amendment where the rich man . . . enjoys the benefit of counsel's [assistance] . . . while the indigent . . . is forced to shift for himself . . . . [T]he evil is . . . discrimination against the indigent . . . . [A]n unconstitutional line has been drawn between rich and poor [372 U.S. at 355, 357, 358].

However, in terms of the analysis presented in this brief, we believe *Douglas* is an ability-to-pay case. In any event, it is clear from *Douglas* that lines drawn on the basis of wealth constitute invidious discrimination.

hinges upon whether or not he can pay for the assistance of counsel" (372 U.S. at 355-356).

A long line of cases followed in the train of *Griffin* and *Douglas*. See *Williams* v. *Illinois*, 399 U.S. 235, 241-42 (1970) (imprisonment to pay unpaid fines); *Williams* v. *Oklahoma City*, 395 U.S. 458, 460 (1969) (denial of trial transcript for lack of fee); *Anders* v. *California*, 386 U.S. 738, 741 (1967) (lack of funds to retain appellate counsel); *Swenson* v. *Bosler*, 386 U.S. 258, 259 (1967) (same); *Long* v. *District Court*, 388 U.S. 192, 194 (1966) (transcript); *Draper* v. *Washington*, 372 U.S. 487, 497-98 (1963) (transcript); *Lane* v. *Brown*, 372 U.S. 477, 483-84 (1963) (transcript); *Smith* v. *Bennett*, 365 U.S. 708, 710, 711, 714 (1961) (*habeas corpus* writ denied for lack of fee); *Burns* v. *Ohio*, 360 U.S. 252, 258 (1959) (lack of funds to pay appellate filing fee); *Eskridge* v. *Washington State Bd.*, 357 U.S. 214, 216 (1958) (transcript). See also *Entsminger* v. *Iowa*, 386 U.S. 748, 751-52 (1967); *Roberts* v. *La Vallee*, 389 U.S. 40, 42 (1967). However, none of these cases are as strong for the plaintiffs as the case at bar, involving as it does, discrimination based on wealth—in the narrowest meaning of that phrase.

D. The Line Drawn by the Millage Rollback Act Is Especially Invidious Because It Classifies on the Basis of Wealth in Respect to the Allocation of Educational Resources

As we have indicated above, we do not believe that in the case of a discrimination based on wealth it is necessary to ask for what purpose the discrimination has been made in order to determine whether the "compelling interest" test is applicable. However, if we consider the purpose for which the wealth discrimi-

nation has been made in this case, such consideration only reinforces the conclusion that the strictest judicial scrutiny is required here.

We have suggested that the purposes for which the ability-to-pay discriminations were made in the *Harper* and *Griffin-Douglas* line of decisions were crucial to the outcome. In *Harper* the Court forbade discrimination based on ability to pay because of the *importance* of the benefit involved (i.e., the franchise).[37] As this Court long ago noted, "The political franchise of voting" is "preservative of all rights."[38] Through the franchise, citizens are assured not only that *government* will treat them fairly, but that society will operate fairly. In the *Griffin-Douglas* line of cases the state had intervened in the life of the defendant against his will by initiating a criminal prosecution. Accordingly, the Court held that in determining whether to send a man to jail involuntarily,

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[37] We stress that in our view the result in *Harper* must be accounted for by the *importance* of the benefit rather than by the fact that the benefit in that case happened to be a "right." There are many "rights" with respect to which the state may discriminate on the basis of ability to pay. For example, a citizen has the "right to travel," *Shapiro* v. *Thompson*, *supra*; however, a state is permitted to charge a reasonable fee for the use of its highways, thus discriminating on the basis of ability to pay, even though this has an effect on an indigent's "right to travel." Accordingly, we must conclude that the result in *Harper* must be accounted for on the basis of the *importance* of the "*right to vote*", rather than by the fact that it is a "right." (Analytically, one would reach the result in the case of a reasonable highway use fee by saying that a discrimination based on ability to pay for use of a highway is reviewed under the "reasonable basis" test, and that such a fee meets that test. It probably would not meet the "compelling interest" test.)

[38] *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886); see also, *Reynolds* v. *Sims*, 377 U.S. 533, 561-562 (1964).

the state may not discriminate on the basis of his ability to pay for the process made available to him.

The benefit distributed in the case at bar, educational resources, partakes of many of the elements which led the Court in *Harper* and in the *Griffin-Douglas* line of cases to conclude that the state may not discriminate on the basis of ability to pay. For these reasons, we believe that in the area of education—certainly through high school—a state is forbidden, in the absence of a compelling state interest, to discriminate on the basis of ability to pay.[39] Obviously, the Court need not reach that question in this case. Our point here is a narrow one: Considering the nature of the benefit involved in this case (i.e., educational resources), it is especially clear that the "compelling interest" test must be applied. Like the benefit in *Harper* (the franchise), the benefit involved here (educational resources) is of the utmost importance. Moreover, like the state intervention in *Griffin-Douglas*, which was without defendants' consent, Florida, too, has intervened involuntarily in the life of its children without their consent by making education compulsory. Accordingly, the state may not in these circumstances discriminate on the basis of ability to pay, and *a fortiori* it may not do so on the basis of wealth.[40]

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[39] Compare *McInnis* v. *Ogilvie*, 394 U.S. 322 (1969), *affirming mem.*, *McInnis* v. *Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968) and *Burruss* v. *Wilkerson*, *affirming mem.*, 310 F. Supp. 572 (W.D. Va. 1969), discussed, *infra*, pp. 47-59.

[40] A separate consideration which also militates toward a more stringent review is the fact that we are dealing here with the rights of children, an especially helpless minority who do not have access to the political process and who are in special need of the

1. The Importance of Education

In 1749 Benjamin Franklin wrote:

> The good Education of Youth has been esteemed by Men in all Ages, as the Surest Foundation of the Happiness both of private Families and of Commonwealths . . . Capacities require Cultivation, it being truly with them, as with the best Ground, which unless well tilled and sowed with profitable Seed, produces only ranker Weeds.[41]

This thought was echoed by this Court almost 200 years later when it said, "The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny." *Illinois* v. *Board of Education*, 333 U.S. 203, 231 (1948).

And as this Court said in *Brown* v. *Board of Education*, 347 U.S. 483 (1954):

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later pro-

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Court's protection. As Mr. Justice Blackmun recently stated in *Wyman* v. *James*, 39 U.S.L.W. 4085, 5088 (decided January 12, 1971): "there is no more worthy object of the public's concern [than dependent children]. The dependent child's needs are paramount . . ." cf. *Reynolds* v. *Sims*, 377 U.S. 533, 565 (1964). See Choper, "On the Warren Court and Judicial Review," 17 C. U. L. Rev. 20, 36-42 (1967).

[41] "Proposals Relating to the Education of Youth in Pensilvania" (1749), 2 *Works of Benjamin Franklin* (Smyth ed. 1905), p. 388.

fessional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[42]

In *Brown*, the Court went on to say:

> The opportunity of an education . . . where the state has undertaken to provide it, is a right which must be made available to all on equal terms [347 U.S. at 493].[43]

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[42] The Court of Appeals for the Fifth Circuit has used similar language:

> It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens. [*Dixon* v. *Alabama State Board of Education*, 294 F.2d 150, 157 (5th Cir. 1961)].

[43] See also *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649, 656 (E.D. La. 1961), *aff'd on opinion below*, 368 U.S. 516 (1962). In 1779 Thomas Jefferson introduced in the Virginia legislature, "A Bill for the More General Difusion of Knowledge," 2 *The Papers of Thomas Jefferson* (Boyd ed. 1950), pp. 526-27. He stated:

> Whereas it is generally true that *people will be happiest* whose laws are best, and are best administered, and that laws will be wisely formed and honestly administered in proportion as those who form and administer them are wise and honest; whence it becomes expedient for promoting the publick happiness that those persons, whom nature hath endowed with genius and virtue, should be rendered by liberal education worthy to receive, and able to guard, the sacred deposits of the rights and liberties of their fellow citizens, and that they should be called to that charge without regard to wealth, birth or other accidental condition or circumstance; but the indigence of the greater number disabling them from so educating at their own expense, those of their children whom nature hath fittly formed and disposed to become useful instruments for the publick, it is better that such should be sought for and educated at the common expence of all.

In short, education not only provides individuals with a basis for pursuing a happy and satisfying life, but also enables the state itself to function properly. So understood, few things could be deemed more fundamental or important.[44] For this reason, education may

[44] Some have suggested that the opportunity to obtain an education in twentieth century America must be considered a fundamental right, and if so, this fact alone may result in the application of the "compelling interest" test. In *McDonald* v. *Board of Election Commissioners of Chicago*, 394 U.S. 802, 807 (1969), the Court suggested that the "compelling interest" test is applicable whenever a "basic fundamental right" is involved. While this Court has not yet found education to be a fundamental right, it has, despite the absence of any specific language in the Constitution, found interstate travel to be a constitutionally protected right (*Shapiro* v. *Thompson*, 394 U.S. 618, 630 (1969)), and found procreation to be a "basic civil right" (*Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942)). In both of these cases, the Court applied a more stringent standard of review in an equal protection context, based on its finding that it was dealing with a fundamental right. (But see footnote 37). Similarly, the Court has found that the franchise in a state election is a fundamental right and that, therefore, the "compelling interest" test is applicable to legislative distinctions denying this franchise. (See, for example, *Kramer* v. *Union Free School District*, 395 U.S. 621, 627 (1969)). Finally, again without specific language in the Constitution, the Court has found a constitutionally protected right of privacy (*Griswold* v. *Connecticut*, 381 U.S. 479, 484-85 (1965)).

From this it follows that the "compelling interest" test would be applicable here if education were found—like interstate travel, procreation, privacy and the franchise in a state election—to be a constitutionally protected right. Certainly many, if not all, of the considerations which lead the Court to conclude that these other benefits are constitutionally protected rights are applicable to education. Cf. "Developments in the Law—Equal Protection," 82 Harv. L. Rev. 1065, 1133 (1969):

> History and custom, however, have by now established the assumption that everyone will receive some education, to be provided by the state if by no one else, and that a person's color or financial status should not determine how much education he gets. Education has come to be recognized as a

properly be compared with the right to vote, to which this Court applied the strictest standard of equal treatment in *Harper*.[45]

2. The Compulsory Nature of Education

Moreover, education in this country is compulsory. In Florida,[46] as in most states in the nation, children are required by law to attend school. Parents who willfully fail to send their children to school are guilty of a criminal offense.[47] When a state brings the weight of its sovereignty to bear by *requiring* a child to be educated, and, in addition, provides the major facilities for that education, it has intervened in the life of that child to much the same extent as was true in the *Griffin-Douglas* line of cases.

No one doubts that Florida's intervention in the life of its children, reflected in its compulsory school attendance laws, is as wise from society's viewpoint as was the criminal prosecution in the *Griffin-Douglas* line. And we also recognize that the two situations can be distinguished on the ground that in the case of compulsory school attendance laws the principal purpose

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critical interest similar to those involved in voting and the criminal process, necessary to a meaningful participation in human society and in the benefits which it offers.

See also Coons, Clune and Sugarman, "Educational Opportunity: A Workable Constitutional Test for State Financial Structures," 57 Calif. L. Rev. 305, 382-89 (1969).

[45] The strictest standard of review has been regularly applied in cases involving elections and the right to vote. See *Williams* v. *Rhodes*, 393 U.S. 23 (1968); *Reynolds* v. *Sims*, 377 U.S. 533 (1964) and subsequent reapportionment cases. See also *Hall* v. *Beals*, 396 U.S. 45, 52 (1969) (Marshall, J., dissenting).

[46] F.S.A. §§ 232.01-232.45.

[47] F.S.A. §§ 232.09, 232.19.

is to benefit the student, while in the case of the criminal prosecution the principal purpose is, if not correction, punishment. However, we believe that the critical element is, or should be, the fact of the state's compulsory and involuntary intervention, whatever might be its purpose. This may perhaps be illustrated by another hypothetical case. Suppose Florida passed a compulsory innoculation statute to guard against an epidemic disease, but made available only two serums which could be used. One, available to the recipient at a cost of $10, was without side effects; the other, available to the recipient at a cost of $1, had a potential for causing substantial adverse side effects. Surely such a law would be unconstitutional. Once the state requires innoculation, thus mandatorily intervening in the life of its citizens, it cannot discriminate between the recipients on the basis of their ability to pay. And the fact that the innoculation requirement is designed to benefit, not punish, the recipient is certainly no ground for distinguishing the cases.

* * *

Finally, this Court has already expressed itself that education may not be conditioned on wealth, at least in the absence of a compelling state interest. In the course of its opinion in *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), the Court stated:

> We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. *It could not, for example, reduce expenditures for education by barring indigent children from its schools.* [394 U.S. at 633; emphasis supplied].

The Court in *Shapiro* v. *Thompson* also met and rejected the notion that the state may dispense its largess in proportion to past contributions to the state fisc. Appellants' argument, said the Court:

> [W]ould permit the state to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services.[48]

In summary, this Court explicitly stated in *McDonald* that a state may not discriminate on the basis of wealth (absent a compelling state interest for doing so). In *Harper*, and in the *Griffin-Douglas* line of cases, this Court held that the state may not discriminate even on the basis of ability to pay—again, absent a compelling state interest—when fundamentally important interests are involved and the state involuntarily intervenes in the life of a citizen, considerations which are also applicable here. If, in these circumstances, the state may not discriminate on the

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[48] In addition, three cases are presently before this Court which pose the question whether a particular discrimination based on ability to pay violates the equal protection clause. Two were argued last term and set for reargument this term. In the first of these, *Boddie* v. *Connecticut*, No. 27, Oct. T., 1970, indigent wives who want to divorce their husbands contend that Connecticut's $45 fee to file a divorce proceeding unconstitutionally discriminates against them because of their inability to pay the fee. In the second case, *Sanks* v. *Georgia*, No. 28, Oct. T., 1970, indigent tenants attack a provision of Georgia law which requires a double bond to be put up by a tenant as a prerequisite to defending an eviction proceeding. If the payment requirement in either of these cases is struck down on equal protection grounds, the holding would apply *a fortiori* to a case involving the distribution of educational resources on the basis of ability to pay. In the third case, *Tate* v. *Short*, No. 324, Oct. T., 1970, an indigent criminal defendant was jailed to work off a fine which he was unable to pay. Cf.

basis of ability to pay, surely it may not discriminate as Florida did here on the basis of wealth. Finally, in *Shapiro* v. *Thompson* the Court explicitly stated that wealth discrimination with respect to education would be unconstitutional.[49]

It remains only to discuss *Dandridge* v. *Williams*, 397 U.S. 471 (1970). Appellants argue (Br. 15-16) that the teaching of this case is that the "reasonable basis" test rather than the "compelling interest" test is applicable to the case at bar. We disagree.

Williams v. *Illinois*, 399 U.S. 235 (1970) and *In Re Antazo*, 89 Cal. Rptr. 255, 473 P.2d 999 (1970).

The most prominent lower court decision holding that Government may not discriminate in the distribution of educational resources on the basis of wealth is *Hobson* v. *Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.*, *Smuck* v. *Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

[49] Even Mr. Justice Harlan who has dissented from most of the equal protection cases on which we rely agrees that discrimination based on wealth is unconstitutional:

> It is said that a State cannot discriminate between the "rich" and the "poor" in its system of criminal appeals. That statement of course commands support . . . [*Griffin* v. *Illinois*, 351 U.S. 12, 34 (1956) (dissenting opinion)].
>
> The States, of course, are prohibited by the Equal Protection Clause from discriminating between "rich" and "poor" *as such* in the formulation and *application* of their laws. But it is a far different thing to suggest that this provision prevents the State from adopting a law of general applicability that may affect the poor more harshly than it does the rich. [*Douglas* v. *California*, 372 U.S. 353, 361 (1963) (dissenting opinion) (emphasis supplied as to the word "application")].

However, Justice Harlan does not appear to require the application of the "compelling interest" test to wealth classifications. See *Dandridge* v. *Williams*, 397 U.S. 471, 489 (1970) (concurring opinion); *Shapiro* v. *Thompson*, 394 U.S. 618, 659-61 (1969) (dissenting opinion).

In *Dandridge* the Court sustained Maryland's maximum family grant of welfare payments ($250 per month), regardless of size of the family. The constitutional claim was that this upper limit violated the equal protection clause because it discriminated against large families. The Court ruled that the "reasonable basis" test was applicable. Applying this test, the Court found that the maximum payment was reasonable because it encouraged employment and avoided discrimination between non-working welfare families and families of the working poor.

The Maryland scheme undoubtedly discriminated against large families in the distribution of welfare funds, in that large families received less per person than smaller families.

The fact that the Court did not apply the "compelling interest" test, notwithstanding the importance of the benefit, only indicates that the "compelling interest" test is not applicable on the basis of the importance of the benefit alone;[59] the Court must also examine the differentiating classification. In short, both the differentiating classification and the benefit (or detriment) distributed must be considered in determining whether the "reasonable basis" test or the "compelling interest" test applies. In *Dandridge* the Court ruled that the "reasonable basis" test was applicable to a discrimination based on family size in the distribution of welfare benefits; quite apart from the importance of welfare benefits, the differentiating classification involved—family size—was not an invidious one like wealth or race. Accordingly, while

[59] Cf., Mr. Justice Stewart's opinion in *Oregon* v. *Mitchell*, 39 U.S.L.W. 4037 (decided December 21, 1970).

the opinion in *Dandridge* could have discussed in greater detail why the "compelling interest" test was inapplicable, its application of the "reasonable basis" test was not plainly wrong.

Contrary to appellants' argument, however, *Dandridge* provides no predicate for concluding that a state may discriminate on the basis of *wealth* in the *distribution of educational resources*, or even on the basis of ability to pay, in the distribution of those resources. Accordingly, we conclude that the "compelling interest" test is applicable here and that *Dandridge* does not suggest the contrary.

E. No Reasonable Basis, Let Alone a Compelling State Interest, Can Be Found To Justify the Distinctions Drawn by the Millage Rollback Act

Having concluded that the "compelling interest" test is applicable to this case, we turn now to the question of possible justifications for the Rollback Act. We conclude that the Rollback Act is not only unsupported by a compelling state interest, but lacks even a reasonable basis.

In the court below, we chided the defendants for failing to advance any justification for this unequal treatment. "What interest," we asked, "has Florida in preventing its poorer counties from providing as good an education for their children as its richer counties?" The three-judge court asked the same question (App. 49-50), and searched in vain for an answer. Now for the first time—in their brief in this Court—appellants attempt to provide an answer.

Their answer, in short, is that the Millage Rollback Act is part of a larger legislative package designed to increase state—as opposed to local—support of

public education. By the "massive infusion of state money" made available by this legislative package (Br. 10), which is distributed on a wealth-free basis pursuant to the MFP formula, there is said to be effected a decrease in the variation in per pupil expenditures. In this way, say appellants, the unfairness of requiring districts of varying financial strength to provide substantial support for their own public school systems is ameliorated (Br. 3, 9-13, 18-19).[51] Laudable though this objective may be, appellants never explain why a wealth-related millage limitation on local support for schools is either a necessary or desirable part of this package. Nor do they explain how such a limitation would work in any way to increase state support (distributed on a wealth-free basis) for local public education systems. At best, appellants' argument reduces to the proposition that a wealth-related millage limitation is the necessary political price that must be paid if there is to be any

[51] Interestingly enough, appellants appear to contend that placing the responsibility for the support of local schools on local jurisdictions whose ability to bear that responsibility varies would be unconstitutional:

> To unleash the taxing power of the several school districts by striking down the Millage Rollback Law would compound and magnify the very inequities in public school financing of which appellees complain. The disparity of the tax impact per mill levied would vary so greatly between the property-poor county and the property-rich county as to truly justify a charge of "invidious discrimination", a concept roundly condemned by this Court [Br. 13].

Perhaps appellants mean to suggest that they should be permitted to reduce disparities attributable to local variations in ability to pay by placing a differential tax limitation on poor counties as opposed to rich counties. Such a limitation is a clearly unconstitutional way of alleviating disparities attributable to variations in ability to pay.

additional infusion into county school systems of state funds distributed on a wealth-free basis.[52] This, they suggest, constitutes a "reasonable basis" justifying the discrimination.

It is obvious, however, that this justification will not pass constitutional muster. The Florida legislature may be free to exact almost any price it wishes as a condition of increasing state support for public education—except an unconstitutional price.[53] It could not, for example, enlist necessary political support for greater state funding of public education by requiring, as part of the legislative package, segregated schools. Nor could it increase state support for public education by giving a greater share of the additional funds to wealthy counties than to poor counties. Similarly, it could not enlist the necessary political support for the infusion of new state money into the educational system by placing a more severe limitation on the financial support which poor counties may give to their public schools than on the financial support which rich counties may give to their public schools—which is precisely what Florida has done here.

Appellants further assert that Florida has the right to limit its expenditures for public schools. They

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[52] Although there is no recorded legislative history of the Millage Rollback Act, our understanding is that its enactment simply reflected the political power of certain property owners, who saw the statute as a means of reducing their local taxes and who secured its passage as a political tradeoff for their support of other legislation.

[53] Cf., Mr. Justice Marshall dissenting in *Wyman* v. *James*, 39 U.S.L.W. 4085, 4095-96 (decided January 12, 1971): "A paternalistic notion that a complaining citizen's constitutional rights can be violated so long as the state is somehow helping him is alien to our Nation's philosophy."

quote (Br. 14) from this Court's opinion in *Shapiro* v. *Thompson*, 394 U.S. 618, 633 (1969):

> A state has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures whether for public assistance, public education or any other program . . .

But appellants' abrupt termination of this quotation unfairly neglects the two sentences immediately following:

> But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools.

Neither may it give unequal educational taxing authority to its rich and poor counties. As the *Shapiro* Court said in an only slightly different context, "The saving of welfare costs cannot be an independent ground for an invidious classification" (394 U.S. at 633).

Moreover, if Florida desires to limit the support local communities may give to their public schools, it may easily do so on a non-discriminatory basis. It could, for example, limit the amount of local support for education to X dollars per Instruction Unit, thereby incorporating all of the legitimate factors to which consideration is given in Florida's complicated formula for determining Instruction Units. Or it could impose a limitation in terms of dollars per pupil. This Court has on a number of occasions struck down classifications on equal protection grounds because of the availability of less drastic means for accomplishing the same purpose. For example, in *Shapiro* v. *Thompson*,

394 U.S. 618 (1969), the Court rejected as *unreasonable* a proffered justification of a statute because of the availability of alternative methods for accomplishing the same purpose:

> [T]here is no need for a State to use the one-year waiting period as a safeguard against fraudulent receipt of benefits; for less drastic means are available, and are employed, to minimize that hazard. Of course, a State has a valid interest in preventing fraud by any applicant. . . . [However] it is *unreasonable* to accomplish this objective by the blunderbuss method of denying assistance to all indigent newcomers for an entire year [394 U.S. at 637; emphasis supplied].

In short, when "means more finely tailored to achieve the desired goal," are available (*Turner* v. *Fouche*, 396 U.S. 346, 364 (1970)), the State's failure to use these means may, as it does here, result in an unreasonable classification,[51] and, *a fortiori*, a classification that is unsupported by a compelling state interest.

Appellants also suggest that the Millage Rollback Act "is not discriminatory on its face" (Br. 10) and

[51] See *Williams* v. *Illinois*, 399 U.S. 235, 244 (1970) ("[There are] numerous alternatives to which the State by legislative enactment—or judges within the scope of their authority—may resort in order to avoid imprisoning an indigent beyond the statutory maximum for involuntary nonpayment of a fine or court costs."); *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960) ("The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.") See also, *Carrington* v. *Rash*, 380 U.S. 89, 94-96 (1965); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 512-14 (1964); *Sherbert* v. *Verner*, 374 U.S. 398, 407 (1962); *Talley* v. *California*, 362 U.S. 60, 64 (1960); *Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U.S. 306, 319 (1950); *Baldwin* v. *Seelig*, 294 U.S. 511, 521-22 (1934). See generally Struve, "The Less-Restrictive-Alternative Principle and Economic Due Process," 80 Harv. L. Rev. 1463 (1967).

"applies a ten mill taxing limitation to all Florida counties" (Br. 10). This is true. However, this Court has never regarded itself as confined by such a simplistic view of the requirements of equal protection. It is its effect that condemns the Millage Rollback Act; and that effect is necessarily to discriminate on the basis of wealth.

As the court below noted, "Even though the Act in question applies uniformly to each county it may nevertheless violate the Equal Protection Clause if its effect is discriminatory" (313 F. Supp. at 948; App. 49). Not the ostensibly evenhanded words, but the practical and necessary effect of the statute, given the demonstrable variation among counties in the tax base per pupil, is determinative. The courts must "determine whether there is an arbitrary or invidious discrimination between those classes." *McLaughlin* v. *Florida*, 379 U.S. 184, 191 (1964) and cases there cited. For cases applying this principle and holding statutes void on equal protection grounds based on their effect, see *Williams* v. *Rhodes*, 393 U.S. 23 (1968); *Carrington* v. *Rash*, 380 U.S. 89 (1965); *Reynolds* v. *Sims*, 377 U.S. 533 (1964) and subsequent reapportionment cases; *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218 (1964); *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La. 1961), *aff'd*, 368 U.S. 515 (1962); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886). As Mr. Justice Black stated in *Griffin* v. *Illinois*, 351 U.S. 12, 17, n. 11 (1956), "[A] law nondiscriminatory on its face may be grossly discriminatory in its operation." See also cases there cited and *Williams* v. *Illinois*, 399 U.S. 235, 242 (1970).

Whether appellants will seek to find other justifications for the Millage Rollback Act, we cannot say. In any event, it is appropriate to observe that where avoidance of a danger is advanced to justify a statute, that danger must be a real one with real content, not one which, to use the words of this Court in *Williams* v. *Rhodes*, 393 U.S. 23, 33 (1968), "seems to us no more than 'theoretically imaginable' ".

F. The Significance of McInnis v. Ogilvie, 394 U.S. 322 (1969), and Burruss v. Wilkerson, 397 U.S. 44 (1970), to the Case at Bar

We turn now to a consideration of two *per curiam* decisions, which are relevant here not only because appellants place primary reliance upon them, but also because the Court's opinion and decision in this case may have significant import in interpreting these two decisions to the bench and bar. These cases are *McInnis* v. *Ogilvie*, 294 U.S. 322 (1969), *aff'g mem.*, *McInnis* v. *Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968) (Mr. Justice Douglas would have noted probable jurisdiction), and *Burruss* v. *Wilkerson*, 397 U.S. 44 (1970), *aff'g mem.*, 310 F. Supp. 572 (W.D. Va. 1969) (Mr. Justice Douglas and Mr. Justice White would have noted probable jurisdiction).[55]

[55] These cases and the problems they present have already produced a very considerable literature. See Coons, Clune & Sugarman, *Private Wealth and Public Education* (Harvard University Press, 1970); Silard and White, "Intrastate Inequalities in Public Education: The Case for Judicial Relief Under the Equal Protection Clause," 1970 Wisc. L. Rev. (1970); Shanks, "Equal Education and the Law," 39 *The American Scholar* 255 (1970); Shanks, Book Review, 84 Harv. L. Rev. 256 (1970); Michelman, "Foreword: On Protecting the Poor Through the Fourteenth Amendment," 83 Harv. L. Rev. 7 (1969); Coons, Clune and Sugarman, "Equal Educational Opportunity: A Workable Constitutional

In the *McInnis* case a group of Illinois students attacked that state's legal structure for financing public education because it "permit[ted] wide variations in the expenditures per student from district to district" (293 F. Supp. at 329) by placing major responsibility for financing public schools on local jurisdictions of widely varying financial strength. These students urged a three-judge district court to devise a financing system that would be based on each pupil's "educational needs" (*ibid.*). Recognizing that "the inequities of the existing arrangement are readily apparent" (293 F. Supp. at 331), the district court nevertheless dismissed the complaint without trial on two independent grounds. First, it ruled that "the Fourteenth Amendment does not require that public school expenditures be made only on the basis of pupils' educational needs" (293 F. Supp. at 329). Second, the court would not reallocate state funds on the basis of the students' "educational needs", because the Court found the concept both "nebulous" and "judicially unmanageable" (293 F. Supp. at 329, 335).

Test for State Financial Structures," 57 Calif. L. Rev. 305 (1969); "Developments in the Law—Equal Protection," 82 Harv. L. Rev. 1065 (1969); A. Wise, *Rich Schools, Poor Schools: The Promise of Equal Educational Opportunity* (University of Chicago Press, 1969); Horowitz & Neitring, "Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs from Place to Place Within a State," 15 U.C.L.A. L. Rev. 787 (1968); Kirp, "The Constitutional Dimensions of Equal Educational Opportunity," 38 Harv. Educ. Rev. 635 (1968), reprinted in *Equal Educational Opportunity* (Harvard University Press, 1969); Kurland, "Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined," 35 U. Chi. L. Rev. 583 (1968), reprinted in *The Quality of Inequality: Suburban and Urban Public Schools* (C. Daly, ed.; Univ. of Chicago Press, 1968); Horowitz, "Unseparate but Unequal—The Emerging Fourteenth Amendment Issue in Public School Education," 13 U.C.L.A. L. Rev. 1147 (1966).

On appeal to this Court, the judgment was affirmed by memorandum order for want of a substantial federal question, 394 U.S. 322 (1969). Mr. Justice Douglas would have noted probable jurisdiction.

Burruss presented essentially the same factual situation as *McInnis*. Procedurally, however, defendants presented a motion to dismiss to a single district judge who was thus required to rule on the substantiality of plaintiffs' constitutional contention. Chief Judge Dalton, writing before this Court's *per curiam* affirmance in *McInnis*, ruled that the question was substantial and that a three-judge court must be convened:

> Poverty does appear to be a factor contributing to the conditions which give rise to the plaintiffs' complaint. It is clear beyond question that discrimination based on poverty is no more permissible than racial discrimination . . . . [301 F. Supp. at 1239]

Apparently because the motion to dismiss was not renewed to the three-judge court after this Court's decision in *McInnis*, a trial was had in *Burruss*. Plaintiffs established that they were from a poor rural Virginia county and that their extreme poverty prevented them from providing an even marginally adequate school system despite the fact that their school tax rates were unusually high and far in excess of many counties with well-financed school systems.

When the three-judge court wrote, this Court's decision in *McInnis* had already been handed down. Nevertheless the district court took the occasion in its opinion dismissing the complaint to observe:

> The existence of such deficiencies and differences is forcefully put by plaintiffs' counsel. They are not and cannot be gainsaid [310 F. Supp. at 574].

However, the Court found that

> The circumstances of [the *McInnis* case] are scarcely distinguishable from the facts here [*Ibid.*].

Thus, the Court dismissed the case, but added

> While we must and do deny the plaintiffs' suit, we must notice their beseeming, earnest and justified appeal for help [*Ibid.*].

On appeal to this Court, the judgment was affirmed *per curiam* on the jurisdictional papers. 397 U.S. 44 (1970). Mr. Justice Douglas and Mr. Justice White would have noted probable jurisdiction.

We shall show below that even giving the broadest reading to the *per curiam* decisions in *McInnis* and *Burruss*, both cases are easily distinguishable from the case at bar. However, because how the Court deals here with *McInnis* and *Burruss* will have an inevitable effect on how these cases are applied by lower courts in the future, we shall also discuss the institutional problem which faces the Court in deciding what precedential effect should be given to *per curiam* affirmances of novel and difficult questions. Finally, we shall briefly suggest why we believe *McInnis* and *Burruss* were wrongly decided, not because we think they should be overruled in this case—we do not—but because we believe the Court's consideration of these cases in its opinion in the instant case should not preclude that possibility in future cases.

1. Distinguishing McInnis and Burruss

Initially, and as the court below agreed, *McInnis* and *Burruss* may easily be distinguished from the case at bar, both factually and on the basis of the legal principles involved. Briefly stated, *McInnis*

and *Burruss* both involved discriminations on the basis of ability to pay, while the instant case involves a discrimination based on wealth. As the three-judge court stated in *Burruss*:

> Truth is, the inequalities suffered by the school children of Bath are due to the inability of the county to obtain, locally, the moneys needed to be added to the State contribution to raise the educational provision to the level of that of some of the other counties or cities. [310 F. Supp. at 574].

Whatever doubt there may be regarding the constitutionality of a discrimination in the allocation of educational resources based on ability to pay in particular circumstances, it is clear, as we have shown above, that the state may not distinguish among its children simply on the basis of wealth.

The difference in applicable legal principles is reflected by the different factual situations in *McInnis* and *Burruss* on the one hand, and in the instant case on the other. The plaintiffs in *McInnis*[56] challenged the laws structuring the financing of public schools because they "*permit* wide variations in the expenditures per student from district to district" (293 F. Supp. at 329) (emphasis supplied). "State statutes which *permit* such wide variations allegedly deny the less fortunate Illinois students of their Constitutional rights" (293 F. Supp. at 330) (emphasis supplied). Thus, the *McInnis* plaintiffs objected to the fact that some parents in wealthy districts were *able* to finance a better education for their children than parents in poorer districts. This is precisely the opposite of the position taken by appellees here. We do not here

[56] The ensuing discussion applies *pari passu* to *Burruss*.

object to a state scheme that *permits* variations in per pupil expenditures. Our complaint is that the state *prevents* us from adequately undertaking the responsibility of financing our children's education—a responsibility which is identical to that of wealthier counties.

As the court below stated in the instant case:

> The opposite situation [from that in *McInnis* and *Burruss*] confronts us in this case where the school districts (counties) are seeking, through the plaintiffs, *to be able* "to determine their own tax burden according to the importance which they place upon public schools."
>
> The Florida Act *prevents* the local Boards from adequately financing their children's education. The complaint is not [as in *McInnis* and *Burruss*] that the state *permits* the Boards to spend less, but that it *requires* them to spend less. Plaintiffs are asking to be able to *raise* more money *locally*. In *McInnis* the plaintiffs wanted the state to *give* them more. Irrespective of the plaintiffs' successful attack on the Act, we know that there will continue to be disparities in per pupil expenditures in Florida, either because some counties may not desire to spend as much as other counties on the education of their children, or because, in the poorer counties, they cannot. Plaintiffs do not contest the variations in per pupil expenditures from these causes, but only "the unequal impediment placed on us by the state because we are poor." We consider this to be a fundamental distinction between the cases [313 F. Supp. at 949; App. 51-52].

The *McInnis* case may also be distinguished on the ground that the *McInnis* plaintiffs argued that the court was under a judicial duty to allocate the state's educational resources according to individual students'

educational needs.[57] However, because the concept of education needs was left undefined (as the court noted at 293 F.2d at 329, n. 4, 335, 336), the court was faced with a "definition of standard" problem. By contrast, we have here no problem of defining the standard by which to allocate educational resources; we argue only negatively, that the state is forbidden to discriminate on the basis of wealth.[58]

Finally, in this case, in contrast to the *McInnis* case, we seek no judicially unmanageable relief. No matter who prevails here, the Florida state authorities will carry on exactly as before. If appellants prevail, the state will continue to disburse MFP funds because no county will levy in excess of 10 mills. If appellees prevail, the state will continue to disburse the same amount of MFP funds because there will be no Roll-back Act sanction to prevent it from doing so.

2. McInnis and Burruss Should Be Limited to Their Precise Facts

Thus far, our discussion of *McInnis* and *Burruss* has assumed, contrary to fact, that the lower court opinions in those cases had been adopted *in haec verba* by this Court. As we have shown, even were this the case, appellees would nevertheless be entitled to an affirmance here. In fact, this was not the case. Each of these decisions was affirmed *per curiam* on

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[57] Compare our use of the term educational needs. See footnote 23, *supra*, p. 20.

[58] There are an enormous number of non-wealth-related financing systems, many of them allowing the local jurisdiction to set its own local tax-rate depending on the importance it places on education, that do not violate the negative command of the equal protection clause. See Coons, Clune and Sugarman, *Private Wealth and Public Education* (Harv. Univ. Press 1970), pp. 280-83; Shanks, Book Review, 84 Harv. L. Rev. 256 (1970).

jurisdictional papers. This, it seems to us, raises the problem as to the meaning of a *per curiam* affirmance on jurisdictional papers when the question is both novel and difficult—or, to put the matter somewhat differently, how such a *per curiam* decision should be read.

It cannot be gainsaid that, if we look only to the holdings in *McInnis* and *Burruss*, this Court has twice held that states are free to distribute educational resources to local districts on the basis of their ability to pay for them, at least in the particular circumstances of those cases.

However, the experience of recent years clearly suggests that the procedure on appeals is becoming increasingly similar if not identical to the procedure on certiorari. At least in the mind of the practitioner and perhaps also in the mind of the Court, an appellant, like a petitioner, must first seek the Court's consent to hear his case. Reasoning thusly, the notation of probable jurisdiction is the equivalent to the grant of certiorari, and the papers on which each decision is made are substantially identical.

In cases presenting novel and difficult issues, however, the Court cannot reasonably treat appeals as cases in which the issues must pass an initial discretionary screening and, at the same time, treat the summary affirmance or dismissal (which in reality is no more than a failure to note probable jurisdiction) as anything more than a denial of certiorari. Moreover, as a practical matter where a novel and difficult question is decided by summary affirmance on jurisdictional papers, that decision *should* have no more effect on future cases, either in this Court or in lower courts, than a denial of certiorari.

It may well be that the Court has hesitated to state that a summary affirmance of a novel and difficult

question has no precedential value because this would appear to conflict with the congressional directive to give appellate consideration to these cases. The most appropriate resolution of this problem might well be the passage of legislation increasing the area of the Court's discretionary as opposed to obligatory review. However, saying nothing and leaving a *per curiam* affirmance standing as an apparently dispositive precedent of the same factual situation leaves the bench and bar in confusion, discourages the bench and bar from assisting this Court in the resolution of novel and difficult problems after the rendering of a *per curiam* affirmance,[59] and requires the Court itself to act inconsistently and in conflict with its own "prece-

[59] In a number of cases the *McInnis* decision has been taken to foreclose further discussion. In addition to the *Burruss* case, see, e.g., *Serrano* v. *Priest*, Civ. No. 35017 (Calif. Ct. App., 2d Dist., decided September 1, 1970), now on petition for rehearing before Calif. Sup. Ct. No. 938254 ("We are bound by decisions of the Supreme Court on questions depending upon the construction of the United States Constitution . . ., and a summary affirmance by the Supreme Court is a decision on the merits which has precedential value.")

On the other hand, Judge Friendly, after an ambiguous reference to the *McInnis* case, recently stated that "This is a developing area of application of the equal protection clause, and questions should not be deemed unsubstantial merely because they might have been so considered twenty years ago". *McMillan* v. *Garlick*, 430 F.2d 1145, 1150 (2d Cir. 1970). After noting that this area of the law "has already attracted a considerable volume of scholarly writing" (Id., n. 7) citing much of the literature we have cited in footnote 55, Judge Friendly on behalf of a unanimous panel ordered the convening of a three-judge court to consider issues which trench very close to this Court's holding in *McInnis*. Compare the statement of the Fifth Circuit in the instant case ordering the convening of a three-judge court after this Court's decision in *McInnis*: "Noting that lines drawn on wealth are suspect and that we are here dealing with interests which may well be deemed fundamental, we cannot say that there is no reasonably arguable theory of equal protection which would support a decision in favor of the plaintiffs": *Hargrave* v. *McKinney*, 413 F.2d 320, 324-25 (5th Cir. 1969).

dent" when the ultimate resolution of an issue, following briefs and arguments, turns out to be different from what must be regarded as a technical resolution of the issue by the *per curiam* affirmance.[60]

Pending legislative resolution of this problem, it seems to us that it would be entirely appropriate for the Court to state that the precedential value of a *per curiam* affirmance on jurisdictional papers of cases involving novel and difficult issues is limited very narrowly to the particular facts of the decided case. Certainly, that should be so with respect to this Court's *per curiam* affirmances in *McInnis* and *Burruss*, cases which illustrate the problems discussed above. A Delphic one-sentence affirmance of a difficult and novel question must be given the narrowest possible reading, limited to its precise facts, because all that can be said as a result of such an affirmance is that, given the complex of factors presented in a particular case, the appellants were not entitled to prevail at the time. The Court has not disclosed why it ruled as it did and there is no way a subsequent court—this Court or any other—can know whether precisely those factors which caused the Court to rule as it did are present in a subsequent case. Therefore, a *per curiam* decision in these circumstances should not be read as extending beyond the narrow facts of the particular case.

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[60] This Court has on occasion reversed itself even after a series of *per curiam* affirmances. E.g., *Baker* v. *Carr*, 369 U.S. 186, 278 (1962); *McGowan* v. *Maryland*, 366 U.S. 420, 511 (1961). See also *Minersville School District* v. *Gobitis*, 310 U.S. 586 (1940), where the Court gave plenary consideration to an issue which had previously been ruled on in a series of *per curiam* decisions. *Gobitis* was, of course, overruled in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943).

3. Even the Narrow Holding in McInnis and Burruss Is Incorrect

We would be less than candid if we did not note our conviction that *McInnis* and *Burruss* were decided incorrectly and that ultimately this Court will decide *not* to adhere to those decisions. We hasten to add that it is also our view that it would be inappropriate for the Court to overrule those decisions in this case. Nevertheless, it may be appropriate to discuss, if only briefly, the merits of *McInnis* and *Burruss*.

In our view the *next McInnis* or *Burruss* case should be considered as presenting the narrow question as to whether elementary or secondary public school education may be differentially distributed within a state on the basis of ability to pay. This Court has already ruled—we believe correctly—that a state may not discriminate on the basis of ability to pay either in the distribution of the franchise or in access to prerequisites for criminal appeal.[61] The question is, therefore, whether these holdings should be extended to elementary and secondary school education. In addition to factors we have previously discussed,[62] special weight should be given to the unusually heavy state involvement in this education delivery system. In many localities, the state is the exclusive agency which offers this necessary service.[63]

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[61] *Harper* and *Griffin-Douglas* line of cases, see *supra*, pp. 24-30.

[62] The importance of elementary and secondary education, and the fact that elementary and secondary schooling are compulsory.

[63] This factor, together with the factors listed in the previous footnote, easily distinguishes the case of elementary and secondary education from, for example, a municipal opera, for which the same fee is charged of rich and poor alike.

This is not to say that these considerations are exhaustive or that the law in this area[64]—as to when a state is forbidden to discriminate on the basis of ability to pay—is at the end of its development. It is not necessary at this point to define its ultimate reach. The Court, in our view, should proceed on a case by case basis. However, the time has clearly come, we believe, to take the next step.[65]

Indeed, we believe that the step has already been taken, at least in dicta. In *Shapiro* v. *Thompson,* 394 U.S. 618, 633 (1969), the Court stated that a state may not provide benefits to its citizens on the basis of their past tax contributions. Is that not precisely what the states have done when they make the amount of funds available for public education depend on the amount of a local tax?

Consider the case in which the state imposes a statewide real estate tax to support its public education system. Suppose further that the state appropriated to each local district for the operation of its public school system the amount of money which was produced by the state real estate tax from the district. Surely, this would be unconstitutional and in plain violation of this Court's *dicta* in *Shapiro* v. *Thompson, supra.* We submit that this is in fact the same situation that presently exists whenever the state says to its local school districts that they are expected

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[64] Cf. Mr. Justice Marshall dissenting in *Dandridge* v. *Williams,* 397 U.S. 471, 519-30 (1970).

[65] Cf. Mr. Justice Goldberg: "It is said that the Government cannot be expected to equalize all economic disparities. Of course it cannot, but this does not mean that it should not try to eliminate disparities in certain critical areas . . ." Goldberg, "Equality and Governmental Action," 39 N.Y.U. L. Rev. 205, 224 (1964).

to fund their public education system from local real estate taxes, despite their varying abilities to do so.

While we do not seek or expect this Court to overrule *McInnis* and *Burruss* in this case, we would request that the Court do nothing which would hinder the continued exploration of these issues, toward the end that when these issues are directly presented to the Court, it may avail itself of this continued study and, hopefully, rule otherwise than it did in *McInnis* and *Burruss*.

II. THIS COURT SHOULD NOT ABSTAIN FROM DECIDING THIS CASE IN DEFERENCE TO A STATE COURT

There are two possible bases on which abstention might be urged in this case, neither of which is, as we shall show, sound. The first is that the statute under attack here, the Millage Rollback Act, is of uncertain meaning; a state court interpretation of the Rollback Act may either modify the federal constitutional question, or, by construction, avoid it altogether. The second abstention argument which could be put forward here is that appellees might obtain the same relief they seek here on the basis of some provision of Florida law not previously involved in this litigation. The thrust of this argument is that by sending appellees to a state court to seek such relief, the federal constitutional question might be avoided. Neither argument is valid.

1. We agree that where the meaning of the state statute *under attack* is uncertain and a state court interpretation of it might avoid or modify the federal constitutional question, abstention is proper. *Wisconsin* v. *Constantineau*, 39 U.S.L.W. 4128 (decided January 19, 1971); *Fornaris* v. *Ridge Tool Co.*, 400 U.S.

41 (1970); *Reetz* v. *Bozanich*, 397 U.S. 82 (1970); *Zwickler* v. *Koota*, 389 U.S. 241, 249 (1967); *Harman* v. *Forssenius*, 380 U.S. 528, 534-35 (1965).

However, this principle is inapplicable here because there is no conceivable uncertainty in the Millage Rollback Act. It speaks with utter clarity, and appellants have not even attempted to identify any uncertainty or ambiguity in the *statute under attack*, or any interpretation of it which might avoid or modify the federal constitutional question.[66]

2. Appellants' principal abstention argument is that appellees may be able to obtain in a state court the same relief they seek here, but on the basis of some provision of state law, rather than on the basis of the Fourteenth Amendment.

Appellants' contention has been specifically rejected by this Court as to cases, like the instant one,[67] brought under 42 U.S.C. § 1983. *Monroe* v. *Pape*, 365 U.S. 167 (1961); *McNeese* v. *Board of Education*, 397 U.S. 668 (1963). These cases establish the proposition, at least as to Section 1983 cases, that the availability of relief under state law in a state court does not of itself preclude a litigant from first seeking relief in a federal court on federal grounds.

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[66] This is in contrast, for example, to the *Harman* case, *supra*, where the Court considered several suggestions put forth by the state as to how the state statute under attack could be interpreted so as to avoid or modify the federal constitutional question. The Court found that each of these suggestions was so clearly incorrect that it failed to provide the uncertainty which is a precondition to abstention, even though the state statute had never before been interpreted. See also *Zwickler* v. *Koota*, *supra*, at 249.

[67] Appellees' complaint asserts a cause of action under Section 1983 (App. 3).

In *Monroe* v. *Pape*, the Court stated (at 183):

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.

This thought was elaborated in *McNeese* (at 671-72):

> [R]elief under [Section 1983] may not be defeated because relief was not first sought under state law which provided a remedy.
>
> The purposes [of Section 1983] were several-fold —to override certain kinds of state laws, to provide a remedy where state law was inadequate, "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice" *and to provide a remedy in the federal courts supplementary to any remedy any State might have* . . . .
>
> *We would defeat those purposes if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court* [citations omitted; emphasis added].

Appellants' reliance on *Reetz* v. *Bozanich*, *supra*, is misplaced. First, the *Reetz* plaintiffs, unlike appellees in the instant case, did not and could not rely on Section 1983 as a substantive basis for federal jurisdiction (see Appendix in No. 185, Oct. T. 1969, pp. 1-2: *Hague* v. *CIO*, 307 U.S. 496, 527-31 (1939) (Stone, J., concurring); *Eisen* v. *Eastman*, 421 F. 2d 560, 563-66 (2d Cir. 1969)). Appellees here, relying on Section 1983, assert a personal interest affecting a broad class of citizens, compared to the solely economic interest asserted in *Reetz*.

But even if appellees could *not* have brought their action under Section 1983, abstention would be inappropriate here. While *Reetz* did send the litigants to a state court to determine whether they could get the relief they sought on state-law grounds, the subsequent case of *Wisconsin* v. *Constantineau, supra,* held that the possible availability of relief on state-law grounds was not adequate ground for abstention, presumably whether or not the federal cause of action was grounded on Section 1983. "For all we know," argued the dissenters in *Constantineau,* "the state courts would find this statute invalid under the State Constitution." However, the majority rejected this argument. Mr. Justice Douglas, speaking for six members of the Court, stated:

> There is no ambiguity in the statute [under attack] . . . Where there is no ambiguity in the state statute, the federal court should not abstain but proceed to decide the Federal constitutional claim [Slip Op. 6].

This would appear to suggest rather clearly that only an uncertainty or ambiguity in the *statute under attack* would provide the necessary predicate for abstention, the *Reetz* case notwithstanding. The *Constantineau* Court appears to have read the *Reetz* decision only as affirming the well-established principle, as stated in *Reetz*, that abstention "should be ordered only where 'the issue of state law [as to the meaning of the state statute under attack] is uncertain.'" (397 U.S. at 86).[68]

While the holding in *Reetz* can be reconciled with *Constantineau* on the ground that the latter was a

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[68] See Judge Dwyer's excellent discussion of the abstention doctrine (App. 47) and a similar discussion of that doctrine and of the *Reetz* case in *Hall* v. *Garson,* 430 F.2d 430, 436-37 (5th Cir. 1970).

Section 1983 case[69] and *Reetz* was not, the *Constantineau* opinion does not appear to rest on this distinction.[70] A sounder basis for reconciling the holdings in the cases, if that is to be done, is that in *Reetz* the plaintiffs vigorously pressed their non-federal claim side by side with their federal constitutional claim. The *Reetz* plaintiffs even persuaded the lower court of the validity of their non-federal claim. In *Constantineau*, as here, plaintiffs have pressed only their federal constitutional claim. Any state-law claim which appellees may have here is being urged only by appellants. Thus, the *Reetz* case merely held that when a litigant presses a federal constitutional claim *and* a non-federal claim, a federal court should first give a state court the opportunity to pass on the non-federal claim rather than itself passing on that claim. (Cf. *Ashwander* v. *T.V.A.*, 297 U.S. 288, 346-48 (Brandeis, J., concurring)). But the *Reetz* case cannot be interpreted, especially in light of *Constantineau*, as permitting a defendant to dredge up some non-federal ground which the plaintiff has not even pressed, and use this as more or less "reverse removal" to obtain a federal abstention order.

Thus far, we have assumed the existence of a state-law remedy which might give appellees the same relief they seek here. However, appellants have not even directed this Court's attention to the particular provisions of state law under which they suggest appellees might have a substantial possibility of obtaining relief. Although urging this Court to abstain on the basis of a case entitled *The School Board of Broward County,*

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[69] See Appendix in No. 95, Oct. T., 1970, p. 102.

[70] Moreover, it is difficult to understand why abstention should be ordered any more quickly where a claim is based directly on the Fourteenth Amendment, rather than on Section 1983.

Florida v. *Christian*, No. 69-932, Second Judicial Circuit in and for Leon County, Florida, appellants do not even advise the Court what state law contentions have been, or could be, made in that case.[11] Whether the grounds of attack were frivolous or substantial is not disclosed, nor are we told even the provision of the Florida constitution upon which the attack is based.

There is a final consideration which militates against abstention here. In *Harman* v. *Forssenius, supra*, this Court stressed two factors, both present in the instant case, which influenced its decision not to abstain:

1. The delicate and sensitive nature of the constitutional deprivation alleged; and

2. The importance of immediate court relief to a broad class of citizens if the allegations be proved.

The *Harman* Court stated:

> Support for the District Court's refusal to stay the proceedings is found in the nature of the constitutional deprivation alleged and the probable consequences of abstaining.
>
> As this Court has stressed on numerous occasions, "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions of that right strike at the heart of representative government."

[11] On January 12, 1971, counsel for appellees spoke with counsel for Broward County, Lewis Hall, Esquire. Mr. Hall advised that the *Broward County* case had "withered on the vine" and "had been dismissed for lack of prosecution." A call to the Clerk of the Court for Leon County established, however, that no formal order of dismissal has yet been entered. Nevertheless, no action has been taken in the case since September 17, 1969, the date on which the answer was filed. (The complaint was filed on September 3, 1969.)

> In appraising the motion to stay proceedings, the District Court was thus faced with a claimed impairment of the fundamental civil rights of a broad class of citizens.
>
> Given the importance and immediacy of the problem, and the delay inherent in referring questions of state law to state tribunals, it is evident that the District Court did not abuse its discretion in refusing to abstain [380 U.S. at 537; citations omitted].

These considerations are fully applicable here. Few rights could be more important than the right of a child to an educational opportunity unhobbled by unconstitutional restraints. Moreover, the loss to the student appellees is irreparable. There is no way that this Court, or any court, can give them the quality education that they are losing each day as a result of the application of this unconstitutional statute. The "immediacy of the problem" which the Court found in *Harman* is present as well in the case at bar.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

GLASSIE, PEWETT, BEEBE & SHANKS

By

HERSHEL SHANKS
ALLAN I. MENDELSOHN
ROBERT M. PERCE, JR.
Federal Bar Building West
1819 H Street, N. W.
Washington, D. C. 20006

RICHARD H. FRANK
918 Marine Bank Building
Tampa, Florida 33602

Attorneys for Appellees

DAVID RUBIN
1201 Sixteenth Street, N.W.
Washington, D. C. 20006
Of Counsel

APPENDIX A

The Millage Rollback Act, as originally enacted in 1968, provides as follows:

236.251 Tax levy; participation in minimum foundation program; limitation.—

(1) Effective July 1, 1968, each school board desiring to participate in the minimum foundation program for kindergartens and grades one through twelve shall levy no more than ten mills of tax on the nonexempt assessed valuation of the district, exclusive of voted district building and bus, required debt service, and the millage required for junior college minimum effort. If the application of the above millage limitation creates a condition in any district wherein its 1968-69 current operating budget from state and district tax sources cannot exceed its 1967-68 current operating budget by at least twelve hundred dollars per instruction unit, the allocation of state funds shall be increased to the extent necessary to provide a twelve hundred dollar increase per instruction unit in its 1968-69 operating budget.

(2) For the purposes of this section, current operating budget shall mean the total budget from state sources as provided in §§ 236.07(10) and 236.075 and local taxes, exclusive of the amount collected for building and bus, required debt service, and junior college minimum required effort.

(3) The millage limitation of ten mills in this section may be increased to the extent necessary to replace any decrease in funds from Public Law 874 from the previous year.

APPENDIX B

Chapter 70-94, § 8 Florida laws, 1970 made certain changes in the Millage Rollback Act. Printed below is the text of the Millage Rollback Act, the words in brackets being deletions in the Act as originally enacted in 1968 and the words in italics being the additions made by the 1970 amendments:

Section 8. Section 236.251, Florida Statutes, is amended to read:

236.251 Tax levy; participation in minimum foundation program; limitation.—

[(1)] Effective July 1, [1968,] *1970,* each school board desiring to participate in the minimum foundation program for kindergartens and grades one (1) through twelve (12) shall levy no more than ten (10) mills of tax on the nonexempt assessed valuation of the district, exclusive of *millage voted for:* [voted district building and bus,] *local capital improvement,* required debt service, [and the millage] required [for] junior college minimum effort[.] *, required additional kindergarten local effort, commissions to tax collector and tax assessor, deficit in state funding of retirement matching, cost of liability insurance due to waiver of sovereign immunity, capital improvements under section 9 of article VII of the state constitution, and the amount of money necessary to replace any decrease in funds from Public Law 874, decrease meaning the difference between that amount of money received by the school district during the current fiscal year and the largest amount of money received by the said district under the said law subsequent to July 1, 1967.* [If the application of the above millage limitation creates a condition in any district wherein its 1968-69 current operating budget from state and district tax sources cannot exceed its 1967-68 current operating budget by at least twelve hundred dollars per instruction unit, the allocation of state funds shall be increased to the extent necessary to provide a twelve hundred dollar

increase per instruction unit in its 1968-69 operating budget.

(2) For the purposes of this section, current operating budget shall mean the total budget from state sources as provided in sections 236.07(10) and 236.075 and local taxes, exclusive of the amount collected for building and bus, required debt service, and junior college minimum required effort.

(3) The millage limitation of ten mills in this section may be increased to the extent necessary to replace any decrease in funds from Public Law 874 from the previous year.]